(7)

ORIGINAL

In The
Supreme Court of the United States
—— Term, ——

In Re:
Grant Anderson
A.K.A. Jibril L. Ibrahim,
Petitioner

No. 93-8312

Emergency Petition / Application For
Petition For An Extraordinary Writ Of Habeas Corpus

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120 pp

Question Presented

Has All Levels of The Judiciary Made The Remedy Under 28 USCA §§ 2241-2255 And D.C. Code § 23-110 Ineffective And Inadequate To Test The Legality Of Petitioner's Detention -- Incompatible With Article I, § 9, clause 2, United States Constitution.

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No. ____

Emergency Petition Application for An Extraordinary Petition For A Writ of Habeas Corpus

Petitioner, Grant Anderson, through himself, respectfully petitions this Honorable Court for issuance of an Emergency and Extraordinary Petition for a Writ of Habeas Corpus.

Opinions Below

The decisions of the Superior Court of the District of Columbia appears in Petitioner's appendice (App.) at 1a - 7a. Decisions of the D.C. Court of Appeals appears in appendice 8a - 10a. Appendice 11a - 15a represents decisions and court correspondence from the United States District Court for the District of Columbia. Appendice 16a - 18a are decisions of the United States Court of Appeals for the District of Columbia Circuit. Appendix 19a is the correspondence from the Circuit Court dismissing Petitioner's habeas appeal without having jurisdiction.

Jurisdiction

The jurisdiction of this Honorable Court is invoked pursuant to Rule 20.4(a), Rules of the Supreme Court; Title 28 U.S.C. §§ 2241 - 2254 et seq. (as amended May 24, 1949, C. 139 § 112, 63 Stat. 105; Sept. 19, 1966, Pub. L. 89-590, 80 Stat. 811); 28 U.S.C. §§ 2071 - 2072; controlling precedents under Townsend v. Sain, 372 U.S. 293 (1963); Fay v. Noia, 372 U.S. 399 (1963); Strickland v. Washington, 466 U.S. 668 (1984).

Constitutional and Statutory Provisions

The Constitutional Right To Court Access

The constitutional right of court acess has been held to be an independant constitutional right derived from three Constitutional provisions -- the First Amendment right to petition the Government for redress; the Due Process Clause, and Privileges and Immunities Clause. Simmons v. Dickhaut, 804 F 2d 182, 183 (1 st. Cir. 1986); Ryland v. Shapiro, 708 F 2d 967, 971 - 72 (5 th. Cir. 1983).

Congress shall make no law... abridging... the right of the people... to petition the Government for redress of grievances. (excerpt)

Article I, §9, cl. 2 (excerpt)

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or

Invasion the public Safety may require it.

Article IV, §1 (excerpt)

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.

Article VI, §2 (excerpt)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby.

Amendment V, United States Constitution (excerpt)

no person shall... be deprived of... liberty, or property without due process of law.

Amendment VI, United States Constitution (excerpt)

In all criminal prosecutions... the accused shall enjoy the right to a speedy trial... and to have the assistance of counsel for the defence.

Amendment IX (excerpt)

Certain rights shall not be construed to deny or disparage others retained by the people.

Amendment XIV (excerpt)

no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. 1/

42 U.S.C.A. § 1981 (excerpt)

All persons within the jurisdiction of the United States shall have the same rights in every State and Territory . . . to sue, and to the full and equal benefit of all laws and proceedings.

Statement of the Case

Facts

Petitioner recites only so much of the fine and one half year history of this litigation as is necessary for determination of the issues presented to this Court. Petitioner was tried and convicted following a jury trial in the Superior Court of the District of Columbia in F-7226-88, of Assault with intent to Rape while Armed; Burglary I while Armed, two counts, and Assaulting, Resisting or Interfering with a Police Officer while Armed, on September 7, 1988.

The petitioner appeared before Superior Court Judge Reggie B. Walton for a preliminary bail hearing — where petitioner was held under preventive deten-

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1. The Fifth Amendment Due Process Clause embraces this restraint and applies it to the District of Columbia, Bolling v. Sharpe, 347 U.S. 497 (1954) (Fifth Amendment Due Process Clause imposes on District of Columbia same restrictions as those imposed on states by Fourteenth Amendment's Equal Protection Clause.

tion . . . based on Judge Walton's deliberate prevarication of the police report that the complainant identified the petitioner. However, evidence averred during the trial revealed that the complainant, in court, could not identify the petitioner. Moreover, trial counsel, Avis E Buchanan, tacitly refused to challenge the inaccuracy of the information to allow the petitioner's Due Process rights be violated.

After being ordered held without bail, in August of 1988, counsels Lochon and Buchanan, interviewed petitioner at D.C. Jail in the event he elected to testify in his own behalf. At this meeting, petitioner provided counsels with two crucial witnesses; 1) Dr. Morant, his attending physician, and 2) Mr. Mike Robinson, an eye-witness to the sequence of events. Through a conversation petitioner had with Dr. Morant after recovery from the gunshot wound, Dr. Morant expressed disbelief that petitioner could have carried out the alleged crimes, because, according to her, the petitioner was so inebriated that he should not had been unable to walk. Additionally, Mr. Robinson had visited petitioner at D.C. Jail and explicated that he saw petitioner stagger from the passenger side of the car - walk or wobble around the corner and heard the gunshot . . . then he saw police officers race around the side of the building where petitioner ventured. Each were willing to testify at petitioner's trial.

Furthermore, through conversations with the petitioner's sister and her friend, Ms. Mildred Evans, each saw petitioner being lifted on a stretcher on June 22, 1988, and explicitly heard the news broadcast that other persons were also arrested in the vicinity where petitioner was shot and arrested, and charged with similar crimes. Counsel, Avis Buchanan, failed to subpoena the arrest records from the precinct where petitioner was shot and arrested to prepare a defense. Additionally, there were statements the complainant made to the Head Detective and Officer Donald Williams that the petitioner never touched her, and counsel failed to present this potential evidence during the trial of petitioner, as well as, statements made by Ms. McHugh concerning her initial phone call to the precinct that the person who depicted was light-skin with light colored hair... also suppressed by counsel.

The trial commenced on August 27, 1988, and continued over to September 7, 1988. The petitioner was convicted on all counts of the indictment. A sentencing hearing date was set for October 27, 1988. Prior to sentencing, petitioner filed with the trial court a pro se motion for a new trial, alluding claims of ineffective assistance of counsel; juror misconduct and insufficiency of evidence to convict on assault with intent to rape.

At the sentencing hearing, the trial court denied petitioner's motion without a hearing... based upon

the Court's belief that the evidence was sufficient. The Court thereupon sentenced petitioner to three 15 years to Life terms and 40 months to ten years. In other words, petitioner had been convicted and sentenced upon two Burglary I charges which stemmed from one sole entry. Trial counsel noted the appeal from the trial phases, but, however, deliberately did not file the appeal from the new trial motion.

District of Columbia Court of Appeals Proceedings:

From the timely notice of appeal filed from petitioner's trial court errors, but not from the new trial motion, the D.C. Court of Appeals assigned counsel Milton Jong Lee, Jr., to prosecute the appeal. The case was assigned 88-1522. Mr. Lee and petitioner conferred on several occasions, and counsel opinioned that trial counsel rendered the petitioner ineffective assistance under his Sixth Amendment. As a result of the conflict of interest in representing claims against his contingent, counsel informed petitioner that he would withdraw and request outside counsel's appointment. The Court thereafter appointed Herbie J. Di Bona.

The petitioner never had contact with new counsel, and was transferred to an out of state facility in Texas. Counsel notified petitioner in March of 1989 of his appointment. The petitioner presented counsel Di Bona with a list of issues from his previous discussion with Mr. Lee.

In June of 1989, petitioner requested counsel to stay his appeal and raise the issues in the trial court level to challenge 1) ineffective assistance; for failure to conduct an adequate pretrial investigation; 2) failure to call a potential witness, Dr. McRand; 3) suppression of the Radio Run describing the assailant as "light skin with light colored hair"; 4) failure to file a notice of appeal from the denial of the new trial motion; 5) sufficiency of evidence; 6) variance and constructive amendment of the indictment; 7) disportionate sentence; 8) double jeopardy where petitioner was sentenced on (2) two Burglaries from one sole entry; 9) failure to secure the crucial testimony or deposition of Mr. Robinson - after introducing him to the jury; 10) failure to elicit the testimony of Ms. Anderson from the witness stand, concerning her conversation with Officer Bradford -- who unsolicitly stated he did not shoot the petitioner, but testified that he did; 11) failure to preserve issues for appellate review from the denial of bail based on a prevaricated account of events by Judge Walton; 12) failure to subpoena the arrest book from the Precinct where petitioner was shot and others were arrested and charged with similar crimes; 13) improper closing arguments by prosecution; 14) prosecutor's impeachment of his own key witness to bolster his case; 15) failure of the trial court to make an adequate inquiry before denying new trial motion; 16) and, inaccuracy of

petitioner's trial transcripts which the appellate court reviewed and utilized to affirm petitioner's appeal in violation of his due process rights.

Appellate counsel adamantly refused to investigate these areas and thereafter, abandoned these claims in violation of petitioner's Sixth Amendment rights. The double jeopardy was not raised by counsel on appeal and he then filed a meritless brief which he knew could not survive appellate review. On February 26, 1990, petitioner's appeal was argued, and affirmed on February 28, 1990. The D.C. Court of Appeals reversed one of the two Burglary convictions to cover appellate counsel's deficiency.

In March of 1990, petitioner filed a pro se motion to recall mandate for ineffective assistance of appellate counsel's refusal to investigate trial counsel's deficient performance... which was brought to his attention seven months prior to oral argument. The D.C. Court of Appeals dismissed the recall of mandate motion - directing petitioner to file his own post-conviction motion under D.C. Code 23-110, to challenge ineffective assistance; prosecutorial misconduct and inaccuracy of trial transcripts.

Superior Court of the District of Columbia Proceedings

In April of 1990, Petitioner filed his pro se motion under D.C. Code § 23-110, challenging ineffective assistance of counsel; prosecutorial misconduct and inaccuracy of his trial transcripts . . . which the appellate court relied upon to affirm petitioner's appeal on February 28, 1990. (App. 1a). The Superior Court, Judge Harold Cushenberry, by order, collaterally estopped petitioner's claims, and denied relief based on one subdivision of ineffective assistance and leaving prosecutorial misconduct and inaccuracy of trial transcripts. (App. 2a)

In 1991, Petitioner filed a successive D.C. Code § 23-110, which was also foreclosed and thereafter, petitioner moved for relief from judgment - alleging that the Court failed to resolve all issues from the April 1991 dismissal. Petitioner then requested disqualification of Judge Cushenberry, do to his being a party/defendant in a lawsuit in the Federal Court which was granted. (App. 3a)

The petitioner filed a third post-conviction motion which requested a new trial - newly discovered evidence, as the basis for the motion. (App. 4a). The petitioner's new evidence was acquired from a lawsuit filed by him against Government witness Officer Bradford, stemming from the shooting of petitioner on June 28, 1988. It was at this juncture that the petitioner received exculpatory statements made by the complainant to officer Donald Williams and

and Lead Investigating Detective on June 28, 1988. The civil action was docketed [89-CV 2776 LFO], and were statements made during the Internal Affairs Inquiry into the shooting of the petitioner. This information was never attempted to be secured by trial counsel Buchanan.

The petitioners new trial motion appendiced these statements, and Judge Robert Shuker, who inherited the case after Judge Cushenberry disqualified himself (App. 4a), also collaterally estopped petitioner's claims. (App. 5a). Petitioner requested leave to appeal in forma pauperis from the interlocutory ruling which was denied. The petitioner requested counsel, and the court denied his request, but appointed Robert Dowlut for the sole purpose of filing the appeal. Additionally, petitioner requested disqualification of Judge Shuker -- after realizing that he had vowed to retribute against petitioner through counsel Christopher Hall. Mr. Hall informed petitioner that Judge Shuker would personally retrieve any new indictments which may come within the ambit of Superior Court, because he felt petitioner had pulled a fast one. Judge Shuker denied the motion to disqualify as well as several filed by counsel Robert Dowlut.

Petitioner submitted a fourth motion to set aside convictions, which was inherited again by Judge Shuker, who also denied it without full faith and credit review. (App 5a). Petitioner became frustrated and filed his habeas corpus petition with Superior Court special proceedings branch, (App. 6a), also denied without addressing the merits and converted to another D.C. Code § 23-110 by Judge Dess to foreclose court access.

District of Columbia Court of Appeals Proceedings:

After petitioner's appeal having been affirmed, (App 7a), petitioner moved the Court to Reopen his Appeal to address the issues of ineffective assistance of appellate counsel's refusal to stay his appeal - which subject petitioner to abandonment of substantive rights and procedural default. The D.C. Court of Appeals granted petitioner's motion in 1992, after two other unsuccessful attempts, and appointed Elaine Mittleman. (App. 8a). Counsel also rendered petitioner ineffectiveness by her refusal to rehabilitate every motion petitioner filed since 1990 in 88-1522, and failed to seek his lawful objectives as petitioner's advocate. The D.C. Court of Appeals denied petitioner's motion and supplement, which was the only motion filed by counsel Mittleman. The petitioner sought an extraordinary writ improvidently granted then dismissed in [93-5594].

The appeal filed by counsel Robert Dawkins from [F-7226-88], as a result of the dismissals by Judge Shuker, were docketed under 93-CO-1254 and 93-CO-

302. The D.C. Court of Appeals upheld the lower courts ruling, only referencing his failure to raise all issues while his case was on direct appeal, procedural default. (App. 9a).

Petitioner's Argument:

The petitioner argued that he should have been accorded an evidentiary hearing on the denial of a requests to appeal and interlocutory decision - where his appeal, as alleged, was considered filed the day he dropped it into the institutional mailbox, and that a hearing was necessary of the disqualification requests of Judge Robert Shuker, where issues were dehor the original record and testimony taken from attorney Christopher Hall.

The petitioner then moved for a timely Petition for Rehearing under controlling case law from the D.C. Court of Appeals . . . where his new trial motion had attached affidavits and newly discovered evidence from Officer Donald Williams. (App. 10a), which was also denied. Petitioner filed a Petition for a writ of mandamus to this Court to show cause "why" the court of appeals refuses to adhere to its own mandate to deny petitioner meaningful appellate review, [93-6498], Supreme Court docket number.

Government's Argument:

The Government argued that the Superior Court's dismis

sal of petitioner's "new trial motion for newly discovered evidence" was proper, and that a hearing on disqualification of Judge Shuker was not mandated because petitioner's affidavit to recuse came too late.

District Court Proceedings:

The petitioner filed his federal habeas corpus petition to the District Court for the D.C. Circuit, on four separate occasions. The first was assigned [No. 91-182] in 1991. (App. 11a). The District Court, Judge Thomas F. Hogan, dismissed his proceedings in limine for lack of subject matter jurisdiction.

A second petition was filed and docketed [No 92-1972], also dismissed by Judge Louis F. Oberdorfer. (App. 12a), and without affording Petitioner an evidentiary hearing nor an opportunity to respond prior to dismissal. Each two petitions alleged Sixth Amendment violations, trial court abuses, inaccuracy of trial transcripts, and issues dehors the original record. Moreover, the dismissal by Judge Oberdorfer, resulted in a permanent injunction being imposed upon the petitioner but not requested by either of the parties.

Prior to the imposition of the injunction, petitioner had filed a third habeas corpus petition, and again dismissed by District Judge Pratt. (App. 13a). Petition filed a fourth petition which the Chief Judge John H. Penn, refused to file after the circuit court reversed and vacated the injunction entered on June 16, 1993 by Judge Oberdorfer. After two attempts

the habeas petition was filed when petitioner filed a mandamus proceeding with the Circuit Court. The fourth petition challenged a (44) forty-four month delay in the appellate division to adjudicate all issues from petitioner's direct appeal. The petitioner was purportedly filed under [No. 94-0022], and assigned again to Judge Oberdorfer. (App. 14a)

Habeas proceedings [No. 92-1972] was appealed to the circuit court as well as [No. 93-1057], and each incessantly foreclosed and denied renewals to each court's refusal to issue forth the certificate of probable cause.

United States Court of Appeals Proceedings:

Petitioner's Argument

In habeas proceedings [No. 91-182] was docketed as No. 91-5293; petitioner argued that his habeas petition should have been afforded an evidentiary hearing - where the issues went directly to the core of his unlawful confinement from a Sixth Amendment violation to effective assistance of counsel, under controlling precedents of Townsend v. Sain, 372 U.S. 293 (1963) and Fay v. Noia, 372 US. 399 (1963). (App. 15a). On September 17, 1992, the circuit court dismissed the appeal, (App. 16a) for lack of jurisdiction, but ordered petitioner to show cause why appeal should not be dismissed, however, the court never had jurisdiction, because certificate of probable cause was never issued.

Moreover, in July of 1993, petitioner filed a Petition for a Writ of Coram Nobis to reinstate the habeas appeal [No. 91-5293], for lack of jurisdiction by the D.C. Circuit Court to even entertain petitioner's appeal without a certificate of probable cause being issued as mandated by 28 USC § 2253.

Additionally, in habeas proceedings [No. 92-1972] the petitioner argued that it was error to deny him an evidentiary hearing and to impose a permanent injunction without an opportunity to be heard. In re Powell 851 F 2d 457 (1988) N.10. The case was reversed and remanded, but the question of whether habeas corpus being denied was never addressed. The petitioner has since moved to reinstate the appeal (No. 93-7116) as not being a final order.

Appellee's Argument:

The appellees in (No. 92-1972), the United States and the District of Columbia have remained silent on the matter of dismissal. This case has been lain dormant for more than (14) months awaiting issuance of certificate of probable cause 28 USC § 2253.

In [No. 91-5293], the Circuit Court ordered petitioner to show cause why the appeal should not be dismissed, and petitioner had to run the gantlet of showing that his appeal had merit -- which does not comport with due process. (App. 11a and 18a).

United States Court Of Appeals Decision:

The circuit court in No. 93-7116, formerly civil action (90 CV 2080), and habeas proceedings No. 92-1972, intertwined issues with respect to the lawsuit was reversed and remanded with vacation of the injunction imposed on June 16, 1993 by Judge Oberdorfer. (App. 17a). The petitioner in No. 91-5293, originally habeas proceedings in District Court No. 91-182, was dismissed for lack of jurisdiction. Petitioner filed Petition for Writ of Coram Nobis to reinstate alleging the circuit court never had jurisdiction to entertain the appeal. (App. 18a). The circuit court has foreclosed review and refused to address the question of jurisdiction.

Reasons For Granting Writ

I.

Has all levels of the judiciary made the remedy under 28 U.S.C.A. §§ 2241-2255 and D.C. Code § 23-110 ineffective and inadequate to test the legality of petitioner's detention -- incompatible with Article I, § 9, clause 2, United States Constitution.

The writ should be granted because the issues it raises as to the proper functions between the state and federal courts. This Court has consistently recognized that "the proper observance of the division of functions between the trial courts and circuit courts is important to every case, "especially in cases where the state and federal courts have been asked to issue an effective remedy to cure unconstitutional practices in the lower courts."

This Court in Price v. Johnston, 334 U.S. 266, 68 S.Ct. 1049 (1948) held, the historic and great usage of the writ, regardless of its particular form, is to produce the body of a person before a court for whatever purpose might be essential to the proper disposition of a cause. The most important result of such usage has been to afford a swift and imperative remedy in all cases of illegal restraint upon personal liberty.

We pointed out, too, that the Act of February 5, 1867, c. 28, §1, 14 Stat. 385-386, which in extending the federal writ to state prisoners described the power of the federal courts to take testimony and determine the facts de novo in the largest terms, restated what apparently was common-law understanding. Fay v. Noia, 372 U.S., p. 416, 83 S.Ct., p. 837 N. 27. The bearing provisions of the 1867 Act remain substantially unchanged in the present codification. 28 USC § 2243. Citing Townsend v. Sain, 372 U.S. 293 (1963).

A cursory look at petitioner's four habeas petitions candidly reveal a cognizable Sixth Amendment issue for review. The petitioner alleges that trial counsel's ineffectiveness resulted in the loss of his liberty. See Strickland v. Washington, 466 U.S. 668 (1984). In giving meaning to the requirement of ineffective assistance of counsel . . . we must take its purpose to ensure a fair trial as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as

having produced a just result. Strickland v. Washington, supra, 104 S. Ct. at 2066. A defendant raising a claim of ineffective assistance "must identify the acts or omissions that are alleged not to have been the result of reasonable professional judgment." Id. at 690, 104 S.Ct. at 2066. Citing United States v. Byfield, 795 F. Supp. 468 (D.C. Cir. 1992).

In petitioner's four D.C. Code § 23-110's, and habeas corpus petitions to the District Court, petitioner alleged that trial counsel failed to 1) properly investigate his case in the pretrial stages; 2) secure exculpatory statements made by the complainant to Lead Detective and Officer Donald Williams; 3) failed to minimally attempt to secure testimony and, or, the deposition of Dr. Morant about petitioner's inebriated state to enervate the prosecution's case, centered on specific intent; 4) failed to secure the arrest records of other persons in the vicinity on June 22, 1988, from the precinct in the area; 5) deliberate suppression of the Radisson of a light skinned man with light color or blonde hair - inconsistent with petitioner's contours; 6) denial of confrontation where Ms. McHugh telephoned the description of light skinned man, and counsel suppressed evidence to obviate any questioning of Ms. Hugh while she was on the witness stand; 7) constructive amendment and variance of the indictment which proved an assault, but not an attempted rape as purported; 8) failure to object to

to use of other crimes evidence - 8) when petitioner's witnesses testified he was home and there was no evidence adduced to place petitioner in the vicinity; 9) counsel's stipulating use of convictions beyond ten (10) year limitation; 10) counsel misquoting critical evidence in her closing arguments and summation; 11) concealing witness Mike Robinson, after introducing him to the jurors, and failing to secure his vital testimony, or depose him; 12) allowing prosecutor to infer that petitioner's witnesses had lied to save him before the jurors - without objections; 13) failure to file an appeal from denial of new trial; 14) allowing prosecutor to impeach complainant's testimony and then testifying to personal opinion as a witness without objection; 15) allowing the prosecutor to detail how petitioner shimmied up a pole to gain entry into complainant's apartment without objection; 16) failure of counsel to object to the use of color photographs of the blood splattered walls to inflame the jurors; 17) failure to move to correct a disproportionate sentence under the Eighth Amendment; 18) double jeopardy - where petitioner was sentenced to two life terms stemming from one entry of Burglary; 19) and counsel's failure to preserve all these issues for appellate review.

The essence of an ineffectiveness claim is that counsel's unprofessional errors so upset the adversarial balance between the defense and the prosecution that the trial was rendered unfair and the

verdict rendered suspect. Kimmelman v. Morrison, 106 S. Ct. 2574, 2582 (1986).

Additionally, petitioner raised issues of juror misconduct in his § 23-110 motion... which mandated a hearing, but the lower court has continually foreclosed ... to deny and preempt Full Faith and Credit adjudication. "Motions relating to the problem of juror conduct are to be filed as motions for newly discovered evidence. United States v. Mitchell, 410 F. Supp. 1201 (1976), cert. denied, 431 U.S. 933. Accord, United States v. Williams, 613 F 2d 919, cert. den., 101 S.Ct. 137; United States v. Jones, 597 F. 2d 485 (5th. Cir 1979), reh. denied, 601 F 2d 586, cert. den., 100 S. Ct. 1729. Richardson v. United States, 360 F 2d 366 (5th. Cir. 1966); United States v. Allied Stevedoring Corp., 258 F 2d 104 (2d. Cir. 1958), cert. den., 79 S. Ct. 58. Here, the failure of trial counsel to raise the juror relationship should have been appropriately addressed through habeas proceedings and on a motion for a new trial.

As a result of these unusual exceptional circumstances, where petitioner has filed four (4) petitions under D.C. Code § 23-110 and §§ 2241-2255, in the District Courts; two post-conviction appeals in No. F-7226-88 [appeal numbers 92-CO-302 and 93-CO-1254]; two petitions to Recall Mandate and to Reopen Appeal on ineffectiveness of appellate counsel in [No. 88-1522]; habeas proceedings No. 91-182; 92-1972; 93-1057; 94-0022, each denied and, or, foreclosed to deny petitioner Full Faith and Credit review and

habeas proceeding 91-5298, dismissed by the Circuit Court which never had jurisdiction because certificate of probable cause never issued. That all levels of the judiciary have refused to recognize the authority of this Court under Title 28 U.S.C. §§ 2071-2072, as well as controlling precedents under Townsend and Fay, supra.

The petitioner has perniciously exhausted himself and state judicial remedies since February 1990, as promulgated by Rose v. Lundy, 102 S. Ct. 1198 (1982). This Court also made clear, however, that the exhaustion doctrine does not bar relief where the state remedies are inadequate or fail to "afford a full and fair adjudication of the federal contentions raised" Ex parte Hawk, 321 U.S. at 118, 64 S.Ct. at 450 (1944).

The state and district courts have had ample opportunities to pass on petitioner's claims but chose to politicize them in order to hermetically close the door to his Sixth, Fifth, Eighth, and Fourteenth Amendment claims. The relief to all levels of the judiciary has been incessantly foreclosed through and by the usurpation of judicial power, and to intentionally foreclose and abrogate any remedy to impair court access. See also, Granberry v. Greer, 107 S.Ct. 1671 (1987)(failure to exhaust state remedies does not deprive appellate court of jurisdiction). State prisoners are entitled to relief on writ of habeas corpus in federal courts upon showing a violation of federal constitutional

standards. Milton v. Wainwright, 407 U.S. 371, 377 (1971). Thus, "we sit not to retry state cases de novo but rather to examine the proceedings in the state court to determine if there has been a violation of federal constitutional standards." Zettlemoyer v. Fulcomer, 923 F 2d 284, 291 (3d. Cir. 1991).

Petitioner's petition raised serious improper argument issues of prosecuting attorney which deserved review. A petitioner's writ of habeas corpus will not succeed merely because the prosecutor's actions "were undesirable or even universally condemned." Darden v. Wainwright, 477 U.S. 168 (1986). Rather, we must determine whether the prosecutor's actions "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" Id., citing Donnelly v. DeChristoforo, 416 U.S. 637 (1974). Here, petitioner challenged that prosecuting attorney Jerry Measle, 1) suppressed statements from Internal Affairs investigation which were made by complainant to officer Donald Williams that petitioner "had not" attempted to rape her; 2) argued guilt from flight without court's permission; 3) filing second offender papers at the eleventh hour and with trial court - rather than Chief Judge; 4) inferred that petitioner's witness Mr. Moore and Ms. Anderson had lied to save petitioner; 5) stipulated with counsel to use conviction beyond ten year limitation period; 6) arguing other crimes evidence not adduced from the

trial; 7) suppression of the Radio-Run of light skin man with blonde or light colored hair, and failing to apprise the court after conviction; 8) bolstering complainants testimony to the point where he impeached her and then testified as a witness himself; 9) ordering and acquiescing in the alteration of petitioner's trial transcripts; 10) subjecting petitioner to multiple Life terms for one sole Burglary I entry - exposing petitioner to 'Double Jeopardy.' See Berger v. United States, 295 U.S. 78 (1935). Accord, Solem v. Helm, 463 U.S. 277 (1983); Hernandez v. Estelle, 674 F2d 313 (1981) (deliberate concealment of testimony which would benefit defendant); Gordon v. Nagle, 2 F 3d 385 (CA 11 1993) (when there is no state court decision saying that federal habeas corpus petitioner's claims are procedurally barred but state nevertheless asserts procedural default; it is proper for federal court, as part of its determination of whether state has met its burden of showing procedural default, to examine state procedural rules to see if any remedies are available to petitioner.) Id.

Federal evidentiary hearings are mandatory if: habeas petitioner's allegations, if proven, would entitle right to relief; and state court trier of fact has not, after full and fair hearing, reliably found relevant facts. Jeffries v. Blodgett, 5 F3d 1180 (1993). The Constitution prohibits the criminal conviction of any

person except upon proof of guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368. The petitioner had challenged the sufficiency of evidence - where evidence supported conviction for assault... not attempted rape. Federal courts do not sit to correct errors of fact, but to ensure that individual are not imprisoned in violation of the Constitution. Moore v. Dempsey, 261 U.S. 86, 87-88, 43 S. Ct. 265, 265-266, 67 L.Ed. 543.

Finally, the failure of appellate counsel to stay his appeal and resort to the above challenges denied petitioner his Sixth Amendment rights under Evitts v. Lucey, 469 U.S. —, 105 S. Ct 830 (1985); Powell v. Alabama, 287 U.S. 45 (1932); Ross v. Moffitt, 417 U.S. 600 (1974); United States v. Cronic, 466 U.S. 648 (1984); Strickland v. Washington, 466 U.S. 668 (1984). This Court held in Humphrey v. Cady, 405 U.S. 472 (1972) that waiver of state court remedies such as will bar federal habeas corpus must be the product of an understanding and knowing decision by the petitioner himself, who is not necessarily bound by the decision or default of his counsel. State prisoners are entitled to relief on federal habeas corpus only upon showing that their detention violates the fundamental liberties of the person, safeguarded against state action by the Federal Constitution.

Simply because detention so obtained is intolerable, the opportunity for redress, which presupposes the opportunity to be heard, to argue and present evidence, must never be totally foreclosed. See Frank v. Magnum, 237 U.S. 309, 345-350, 35 S. Ct. 582, 594-596, 59 L.Ed. 969 (dissenting opinion of Mr. Justice Holmes). Citing Townsend v. Sain, 372 U.S. at 756, 83 S. Ct. at 312 (1963).

Petitioner, without the benefit of effective counsels, has done all things possible to perfect his federal claims as a pro-se litigant. A states factual determination not fairly supported by the record cannot be conclusive of federal rights. Fiske v. Kansas, 274 U.S. 380, 385, 47 S. Ct. 655, 656, 71 L-Ed. 1108. Additionally, habeas corpus review by this Court should be granted because this Petition cumulatively present an important question of constitutional law, and because the cessant opinions and holdings below conflicts, by implication and purpose, with previous decisions of this Court. This Court has recognized that the introduction of "other crimes evidence" in certain circumstances may "be so extremely unfair that its admission violates 'fundamental conceptions of justice.'" Dowling v. United States, 110 S. Ct. 668, 674 (1990), citing United States v. Lovasco, 97 S. Ct. 2044, 2048 (1977). Due process of law,

as a historic and generative principle, precludes defining and thereby confining these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend a sense of justice. Citing Brown v. State of Mississippi, 56 S. Ct. 461, 464-465. See also, Pangnecchia v. Wainwright, 658 F 2d 337 (5th. Cir. 1981).

The granting of the writ will be in aid of the Court's appellate jurisdiction because the ordinary means of obtaining appellate review has been foreclosed and usurped by judicial power in the lower courts and time for filing any appeals has long since expired after perniciacks efforts to do so, and the lower court and district courts have refused and not directed final judgments on the merits of habeas corpus review. That petitioner may not obtain review by the normal judicial machinery as a resort unless by remedy through extraordinary process.

That the issuance of this writ will be in aid of this Court's appellate jurisdiction, wherein for present exceptional circumstances warranting the exercise of this court's discretionary powers, and that adequate relief can not be had in any other form or from any other court until this Court acts to confine the inferior courts to its lawful exercise of its prescribed jurisdiction, or to compel it to exercise its authority when it

is its duty to do so. Townsend v. Sain, 372 U.S. 299 (1963) and Fay v. Noia, 372 US 399 (1963). Moreover, petitioner has an exclusive right in finality.

The petitioner respectfully submits that the opinions and decisions below ignored the precedents set forth by this Honorable Court and those previously ruled upon by every federal and state court of appeals, and by the usurpation of power was and is an affront to Petitioner's "due process rights."

Conclusion

For the foregoing reasons and exceptional circumstances which has hermetically foreclosed meaningful Full Faith review, and in light of this Court's controlling precedent in Sawyer v. Whitley, 505 U.S. —, 112 S.Ct. 2514 (1992) (successive use of the writ of habeas corpus ... may have his federal constitutional claims considered on the merits). Petitioner respectfully asks this Court to grant his Petition for a Writ of Habeas Corpus.

Respectfully Submitted

Grant Anderson
AKA Jibril A. Ibrahim
166-978
P.O. Box 85
Barton, VA. 22199

ORIGINAL

93-8312

In The
Supreme Court of the United States
— Term, —

In Re:
Grant Anderson,
Petitioner

No. —

Motion For Leave To Proceed In Forma Pauperis

Petitioner, Grant Anderson, respectfully requests leave to proceed before this Court to file the attached Petition for an Extraordinary Writ of Habeas Corpus pursuant to 28 USCA § 1915 (d), and without being required to pay the costs of said proceedings and to proceed in forma pauperis. In forma pauperis has been granted in the Federal and State courts and previously before this Honorable Court.

Executed On: 2-15-94

Grant Anderson
166-978
P.O. Box 85
Barton, VA. 22199

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

93-8312

I, GRANT ANDERSON being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

ORIGINAL

1. Are you presently employed? Yes---- No---- ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary or wages per month which you received. JUNE 22, 1988 $1200.00 MONTHLY

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends or other sources?
   Yes---- No ---X
   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? Yes ---- No --- ✓
   a. If the answer is yes, state the total value of the items owned. $23.83 PRISON ACCOUNT

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ---- No ----
   a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. NO ONE

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 1-24-94 /s/ Grant Anderson

Subscribed and Sworn to before me this 25th day of January 1994. Uzochi Joy Hagan. My Commission Expires: 3/31/96.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

FELONY BRANCH

UNITED STATES OF AMERICA	:	
	:	Criminal Number: F-7226-88
v.	:	
	:	Judge Harold L. Cushenberry, Jr.
GRANT ANDERSON	:	

MEMORANDUM OPINION AND ORDER

This matter is before the Court[1] upon the Defendant's Pro Se Motion To Vacate Sentence filed pursuant to the District of Columbia Code §23-110 and the Government's Opposition thereto. Having fully considered the record, including the transcript of the trial proceedings, and it appearing to the Court that the Defendant was not denied effective assistance of counsel, Defendant's Pro Se Motion To Vacate Sentence is DENIED.

PROCEDURAL HISTORY

On August 10, 1988, the Defendant, Grant Anderson was indicted on one count of Assault With Intent to Commit Rape While Armed, two counts of First Degree Burglary While Armed, and one count of Assaulting, Resisting, or Interfering With a Police Officer With a Dangerous Weapon. Following a trial by jury on September 7, 1988, the Defendant was found guilty of all counts. At sentencing on October 27, 1988, the Defendant received three concurrent sentences

[1]By memorandum dated June 7, 1989 the Honorable Fred B. Ugast, Chief Judge of the Superior Court of the District of Columbia, transferred all of Judge Reggie B. Walton's post-trial criminal matters to Judge Harold L. Cushenberry, Jr.

P-1

fifteen years to life for Assault With Intent to Commit Rape While Armed and for both counts of First Degree Burglary, with an additional sentence of forty months to ten years for Assaulting, Resisting, or Interfering With a Police Officer With a Dangerous Weapon to run consecutively to the three concurrent sentences.

On November 28, 1988, the Defendant through new counsel, filed notice of appeal on the basis that the trial court erred, both in denying a Motion for Mistrial, and in denying a Motion for Judgment of Acquittal. The Defendant also claimed that the Government's trial rebuttal argument was improper. On February 28, 1990, the District of Columbia Court of Appeals affirmed the trial court in nearly all respects, with the exception of directing the trial court to vacate one of the two Burglary Convictions on Double Jeopardy grounds.

On May 7, 1990, the Defendant submitted a Pro Se Motion for "Bond Pending Appeal" purportedly filed pursuant to the District of Columbia Code §23-1325(c).[2] This Court denied the Defendant's Application For Release On Bond on May 8, 1990.

On April 6, 1990, the Defendant filed the instant Pro Se Motion To Vacate Santance. The Government was ordered to file a

[2]Since the Defandant's direct appeal to the District of Columbia Court of Appeals has resulted in an affirmance of the conviction, and since it did not appear from the record that the Defendant had requested en banc review or filed a petition for writ of certiori to the United States Supreme Court, 23 D.C. Code §1325(c) did not provide a jurisdictional basis for this Court to entertain Defandant's request. Nevertheless, this Court evaluated Defendant's claims, assuming arguendo that 23 D.C. Code §1325(c) was applicable, and concluded that the Defandant was not entitled to be released.

response on or before June 29, 1990. A copy of the Government's response was received in chamber[s] the above date.[3]

FACTS OF THE CASE

A. The Government's Evidence

On June 22, 1988, at approximately midnight, Kathleen Kiefer, who lived in Apartment 9 (nine) at 2730 Wisconsin Avenue, N.W., Washington, D.C. was awakened when someone placed a sharp object on her back. (Tr. I, p. 123).[4] Ms. Kiefer turned over, and by the light of the television, saw a man standing behind her bed, holding a knife. Id. When Ms. Kiefer started to scream, the man told her to "shut up" and repeatedly tried to shove a dishrag into her mouth. Id. She then tried to run from the bedroom, but the attacker hit her in the face with the back of his hand and knocked her to the floor. (Tr. I, pp.125-26). Again telling her to be quiet, the attacker pulled off Kiefer's underpants. (Tr. I, p. 126). He then held the knife to Kiefer's throat and "was going to unzip his pants and get himself out of his pants" when the police began pounding on the door. Id. At this point the assailant bolted from the room, and Ms. Kiefer ran to the front door and

[1]On July 20, 1990 the defendant also filed Pro Se Motions To Subpoena the Court's Records and To Supplement the Amended Complaint. The defendant moved to preserve the rights and issues which were decided by the District of Columbia Court of Appeals. As the Court of Appeals has already decided the issues presented and all other issues related to defendant's Supplemental Motion should have been litigated on direct appeal, this Court will not further address these claims.

[4]"Tr I" refers to the transcript of the trial proceedings from August 31 through September 2, 1988. "Tr. II" refers to the transcript of the trial proceeding on September 7, 1988.

loved the police to enter. Id

Ms. Kiefer testified that most of her attacker's face was covered with some sort of rag. (Tr. I, p. 124). She also described her attacker as a slender black male who was several inches taller than her. (Tr. I, p. 142). On cross-examination, however, Ms. Kiefer admitted that she could not positively identify the Defendant as her assailant because she never got a good look at him. (Tr. I, p. 153).

Joan Hubbard, a neighbor who lived in Apartment 5 (five), testified that she heard a loud noise from Apartment 9 (nine) around midnight, looked out her window into the livingroom of Apartment 9 (nine), and saw a slim, shirtless black man standing with a window screen in his hands. (Tr. I, p. 86). The man then propped the screen against the window pane, moved away from the window, and disappeared into the apartment. (Tr. I, p. 87). Ms. Hubbard hurriedly dialed 911, and reported what she had seen to the police. Id.

Within two minutes after the man entered Apartment 9 (nine), Ms. Hubbard heard screaming and banging coming from the apartment. (Tr. I, pp. 88-89). The police arrived a couple of minutes later, and Ms. Hubbard let them into the building. Id. After leading the police to Apartment 9 (nine), Hubbard ran back to her own apartment and saw the assailant exit from the window of Apartment 9 (nine), and dash across the roof. Id. As the man leapt from the roof, Hubbard saw the white flash of a gunshot meet the man's body. (Tr.

pp. 89-90.)[3]

Allison Fletcher, a neig in Apartment 1 (one), also witnessed the shooting. As Ms. Fletcher was getting ready for bed, she heard screams from another apartment, looked out the window, and saw a man climbing out of the window of an apartment directly across from hers. (Tr. I, pp. 111-112). The man wore pants, no shirt, and had a yellow or light colored bandanna-like cloth around his face. (Tr. I, p. 113). The man ran to the edge of the roof and was shot as he was about to jump from the ledge. Id.

Responding to a radio broadcast, Officers Cabala and Williams of the Metropolitan Police Department arrived on the scene within four minutes of Ms. Hubbard's call. (Tr. I, pp. 87, 165). After searching the area around the apartment building, they met Officers Bradford and McMillan, who were also responding to the radio broadcast, and were standing behind the apartment building. (Tr. I, 166, 197). At this point, the officers heard screams coming from the window directly above where McMillan was standing. (Tr. I, p. 167). Cabala told Bradford to stay where he was, and went with his partner to the front of the building, where two women let them into the building. Id. Ms. Hubbard directed the officers to Apartment 9 (nine), and Cabala pounded on the apartment door, shouting "Police." (Tr. I, 168). Cabala heard a loud crash as seconds later, Kathleen Kiefer came to the door. Id. After Kiefer

[3]On cross-examination, Ms. Hubbard admitted that she could not see the Defendant's face, that she could not see a knife, that it was dark outside, and that the defendant was about thirty feet away from her. (Tr. I, pp. 98-100, 102, 107).

ld Cabala that her attacker ha ust climbed out of the window, Cabala warned Bradford over the radio that the attacker was coming out. Id.[4]

Officer Albert Bradford, an eighteen-year veteran of the Metropolitan Police Department, stood alone in back of the apartment building after hearing slapping noises accompanied by the sounds of a woman's screams from the window of the apartment above him. (Tr. I, p. 200). Just as Bradford heard Cabala yell, "He's coming out," Bradford saw the Defendant jump out of an apartment window and fall to a rooftop below. (Tr. I, p. 201). Bradford noticed that the Defendant had a cloth over his face. Id. Bradford saw the Defendant run toward the edge of the roof with a large knife in his hand. The officer then drew his gun and shouted, "Hold it. Put your hands up." (Tr. I, pp. 201-202). The Defendant did not stop, but leapt off the edge toward Bradford, who shot him in the chest. (Tr. I, p. 202). When Bradford approached the Defendant, he saw him reaching for the knife that had fallen from his grasp, at which point Officer Bradford placed his foot over the knife. (Tr. I, p. 203).[7]

[4]On cross-examination, Cabala admitted that he did not see the Defendant leave the apartment or get shot. (Tr. I, pp. 186, 189-190). Cabala was also questioned extensively about his friendship with Officer Bradford, but indicated that he would not cover up for Bradford under any circumstances. (Tr. I, p. 193).

[7]Defense counsel cross-examined Bradford extensively about his motive for testifying in the case. Defendant's attorney argued that Officer Bradford could conceivably create evidence against the Defendant in order to protect himself from the consequences that would result if he were found to have shot the Defendant without justification. (Tr. I, pp. 213-219).

Officer Cabala was still [illegible]s. Kiefer's apartment when he heard the gunshot. (Tr. I, p 169). Cabala climbed out of the apartment window, ran to the edge of the roof, and saw the defendant lying on the ground with a knife approximately eighteen inches away from his right hand. (Tr. I, pp. 169-171). Cabala also saw the defendant holding a towel, (which has been identified by Ms. Kiefer as the cloth that her attacker used to cover his face), over the gunshot wound in his chest. (Tr. I, p. 175).

As the officers waited for an ambulance, the Defendant attempted to pull something from his back pocket. The officers cautioned the Defendant to remove his hands from his pocket, (Tr. I, p. 178).

Soon after Ms. Kiefer let the police into her apartment, she discovered that her purse was open with its contents spilled to the floor. Her wallet was then found to be missing. (Tr. I, p. 128). Officer Vasili Katopothis subsequently recovered a wallet from the Defendant's back pocket which contained two prescriptions bearing Kathleen Kiefer's name, as well as various forms of identification. (Tr. I, p. 227). Ms. Kiefer identified the wallet as her own, identified the dish towel her attacker had used, the torn panties he ripped from her body, and various other forms of personal identification found in her wallet. (Tr. I, pp. 133-134).

B. The Defense Evidence

The Defendant called three witnesses - his mother, his best friend and himself. His mother, Lillie Belle Anderson, testified that the Defendant received a telephone call at approximately

[redacted]

[illegible]0 p.m. on the evening of the [illegible]ack and left her home around 11:00 p.m. (Tr. I, p. 257). Robert Moore testified that he called the Defendant around 10:30 p.m., picked him up around 11:00 p.m., and went with him to Georgetown to buy some marijuana from a person that he [Moore] knew. (Tr. I, pp. 268-270). Moore left the Defendant in the car when he went to buy the marijuana and discovered that the Defendant was not in the car when he returned. (Tr. I, pp. 272-274). Moore waited about 45 minutes for the Defendant, and then left the Georgetown area without him. (Tr. I, pp.276-277).

On cross-examination, Moore admitted that the Defendant was his best friend (Tr. I, p. 299), that he did not know the apartment number of the person from whom he was buying drugs (Tr. I, p. 283), that he just happened to see the man in the lobby of the building, that he and this party transacted their pre-arranged business in the lobby (Tr. I, pp. 291-292), and that he could have gone to Kenilworth Avenue to buy drugs instead of driving across town to purchase drugs in Georgetown. (Tr. I, p. 290). Moore was impeached with a 1982 conviction for carrying a dangerous weapon and 1987 convictions for distribution of Marijuana and PCP. (Tr. I, p. 265).

The Defendant testified that Moore phoned him around 10:30 p.m. on the night of the assault, and requested that he ride along with him to buy some marijuana. (Tr. I, pp. 303-308). The Defendant said he waited in the car for half an hour while Moore went to purchase the marijuana, and that he subsequently exited the

cle to urinate. (Tr. I, pp. 312).

The Defendant testified that he urinated in the rear of the 2730 Wisconsin Avenue, turned around and got shot. (Tr. I, p. 315). Someone then kicked his legs out from underneath him, said "I got your black mother fucking ass now," and grabbed him by the leg just before he blacked out. Id. The Defendant denied having a knife, stealing the wallet, entering Ms. Kiefer's apartment, or rushing at the police officer. (Tr. I, pp. 316-317).

The Defendant was impeached with a 1976 Bail Reform Act conviction, a 1982 possession of marijuana conviction, and 1983 convictions for distribution of marijuana and PCP. (Tr. I, pp. 304-305). The Defendant, who stated that he urinated in the rear of the apartment building because it was dark, was also impeached with the testimony of rebuttal witness John Allen. Mr. Allen testified that the alley in question was well lit and "extremely bright." (Tr. I, p. 343).

ARGUMENT

The Defendant argues that his sentence should be vacated because he was denied effective assistance of counsel. Specifically, the Defendant claims that his counsel was deficient: (a) in her cross-examination of Government witnesses; (b) in her failure to call a defense witness; (c) in her failure to obtain exculpatory statements made to the Defendant's mother by one of the arresting officers; (d) in her failure to request a missing witness instruction and; (e) in her failure to move for a mistrial after the Court denied a request to inform the jury of the possibility of

olling before it reached a verd

Standards for Collateral Relief

Collateral attack of a conviction is warranted only when the "claimed error of law [resulted in a] fundamental defect which inherently results in a complete miscarriage of justice." Davis v. United States, 417 U.S. , 346 (1974). "The claimed error of law must present exceptional circumstances where the need for the remedy ... is apparent." Id.

The District of Columbia Code §23-110 is not intended to be a substitute for direct review. Head v. United States, 489 A.d 450, 451 (D.C. 1985). Relief is appropriate only for "serious defects in the trial which were not correctable on direct appeal or which appellant was prevented by exceptional circumstances from raising on direct appeal." Id.

The District of Columbia Court of Appeals has stated that a Defendant will be precluded from raising an issue on collateral attack that he failed to present on direct appeal, unless the Defendant can show both "cause and prejudice" for his failure to do so. Shepard v. United States, 533 A.2d 1278, 1281-82 (D.C. 1987). Defendant has made no showing of why he failed to assert on direct appeal that the Government deleted portions of the trial transcript or that he was denied effective assistance of counsel where, as here, Defendant was represented by different counsel on appeal. Shepard v. United States, 533 A.2d 1278, 1281-82 (D.C. 1987). Therefore, this Defendant is barred from raising these instant claims on collateral attack because he failed to raise them on his

ct appeal and has shown n exceptional circumstances" justifying his failure to do so.

Assuming arguendo that the Defendant can establish a basis for collateral attack, the standard of review with regard to an ineffective assistant of counsel claim must be evaluated under the two-prong test set forth in Strickland v. ha ington, 466 U.S. 688 (1984). Under Strickland the Defendant must show: (1) that the performance of counsel was deficient and (2) that the Defendant was prejudiced by counsel's deficiencies.

Ineffective Assistance of Counsel Under Strickland

In the case at bar, defendant argues that counsel's cross-examination was constitutionally deficient because she failed to explore misidentification, failed to elicit or explore inconsistencies in the testimony of the Government's witnesses and failed to uncover the complaining witnesses inability to identify the Defendant at the scene of the crime. The Defendant's assertions in this regard are wholly without merit.

Trial counsel did in fact thoroughly explore the possibility of misidentification; she adroitly challenged the reliability of Ms. Hubbard's identification by focusing the jury's attention on the inconsistencies in her testimony, particularly the fact that she could not see the Defendant's face and that she observed him in the dark from thirty feet away. Counsel delved into the fact that Officer Cabala did not see the Defendant run from the apartment, and, most importantly, counsel elicited on cross-examination that the complainant could not be sure that the defendant was her

assailant at all, as she did n et a good look at him.

Counsel thoroughly challenged the testimony of other Government witnesses, focusing specifically upon the inconsistencies between the testimony of the complainant, who thought that the Defendant may have been wearing a shirt, and the testimony of other witnesses who stated that the Defendant was shirtless. A review of the transcript convincingly shows that trial counsel's cross-examination was not deficient in any respect. The constitutional claim is frivolous.

The Defendant also claims that trial counsel was deficient in failing to call Mike Robinson as a witness. The decision to call or not to call a particular witness "is a judgment 'left almost exclusively to counsel.'" Smith v. United States, 454 A.2d 822, 825 (D.C. 1985). Furthermore, the Defendant has not submitted any affidavit or declaration to support the substance of Mr. Robinson's proposed testimony nor its potential relevance to his defense.[8]

Defendant submits further that his counsel was ineffective in failing to obtain exculpatory statements made to his mother by arresting Officer Bradford. The Defendant's allegations regarding exculpatory statements made to his mother are not supported by

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[8]The Defendant's proffer only indicates that Mr. Robinson was in the car on the evening in question, for the trip into Georgetown for the purposes of procuring marijuana. The Defendant does not suggest that Mr. Robinson could provide exculpatory information, nor does Defendant claim that Robinson was with him during the events leading up to the Defendant's arrest. In addition, the Defendant's proffer is contradicted by his own trial testimony, in which he never mentioned anything about a third person in the car. Likewise, Robert Moore, Defendant's "best friend" never mentioned anything regarding a third person in the car during the trip into Georgetown.

ther affidavit nor declaration [illegible] his mother. The Defendant's purely conclusory allegations do not entitle him to relief. Ellerbe v. United States, 545 A.2d 1197, 1199 (D.C.), cert. denied, 469 U.S. 936 (1988).[9]

Likewise, there is no merit to the Defendant's claim that trial counsel was ineffective in failing to request a "missing witness" instruction. The "missing witness" that the Defendant is referring to was a defense witness rather than a Government witness and therefore it would have been improper for defense counsel to request such an instruction. All of Defendant's assertions that his trial counsel was ineffective and/or deficient are unsubstantiated by the record and transcripts of the trial proceeding below.

Counsel's performance was not deficient in failing to move for a mistrial when the court denied her pre-verdict polling request. There was no basis for the request and no basis for a mistrial motion. After the close of the evidence, defense counsel asked the court if it would explain to the jury that it might be polled after it reached a verdict. The Court denied this request. The Court did in fact explain the polling procedure when he allowed the jury to be polled after it reached a verdict. Counsel was fully justified in opting not to file a motion for mistrial based upon

[9]In addition, such a statement would clearly constitute hearsay and would be inadmissible and incredible in view of Officer Bradford's trial testimony.

[illegible] Court's denial of the pre-v[illegible]ct polling request.[10]

Defendant not Prejudiced by Counsel's Representations Under Strickland

Even assuming arguendo that counsel's performance was deficient, the Defendant must still shoulder the burden of showing that he was prejudiced as a result. The Defendant has not established a "reasonable probability " that he would have been acquitted but for counsel's alleged errors.[11]

The Defendant was apprehended escaping from the complainant's apartment with a knife in one hand and a towel from the complainant's apartment in the other. The Defendant was arrested with the complainant's wallet in his back pocket. Further, the Defendant was seen escaping from the window by three witnesses, only minutes after he was first seen entering the complainant's apartment. The evidence of guilt was so overwhelming that it is impossible to conclude that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

[10]It should be noted that trial counsel did move for a mistrial when, during Joan Hubbard's testimony, the witness referred to an earlier incident. The Court denied this motion and the Court's denial was upheld on appeal. Anderson v. United States, Memorandum Opinion and Judgment at 2 (D.C. App., February 29, 1990).

[11]The Defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694.

CONCLUSION

Because the Defendant's allegations do not establish that his trial counsel's performance was deficient or that he was prejudiced by counsel's alleged errors, the Pro Se Motion To Vacate must be DENIED.

ACCORDINGLY, it is this 26th day of JULY 1990,

ORDERED, that the Defendant's Pro Se Motion To Vacate Sentence is hereby, DENIED.

/s/ Harold L. Cushenberry

HAROLD L. CUSHENBERRY, JR.
JUDGE

Signed in Chambers

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U.S. Attorney's Office
Felony Trial Division

U.S. Attorney's Office
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Copies mailed to all
parties this date

JUL 31 1990

APPENDIX (App. 2a)

SUPERIOR COURT OF THE D RICT OF COLUMBIA

CRIMINAL DIVISION

FELONY BRANCH

UNITED STATES	:	
v.	:	Criminal N .26-88
GRANT ANDERSON	:	
	:	

ORDER

Upon consideration of Defendant's "Rule 60 Motion For Relief Of Memorandum And Opinion Judgment Void", and the entire record herein, and it appearing to the Court that Defendant's claims are wholly meritless, it is this 14th day of February 1991,

ORDERED, that Defendant's motion is DENIED

HAROLD L. CUSHENBERRY, JR.
JUDGE

Signed in Chambers

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ATTACHMENT "A".

APPENDIX (App. 3a)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CRIMINAL DIVISION

FELONY BRANCH

UNITED STATES	:	
v.	:	
GRANT ANDERSON	:	Criminal No. F-7226-88
	:	

ORDER

Upon consideration of the defendant's Motion Requesting That This Court Recuse itself from any further involvement in this case, and it appearing to this Court that recusal is appropriate to remove even the appearance of bias against the defendant, the undersigned Judge having been named a party defendant in a civil suit filed by the defendant in the United States District Court for the District of Columbia, it is this 18th day of July 1991,

ORDERED, that this Court RECUSES itself from any further action in this case; and it is further,

ORDERED, that the Clerk of the Felony Trial Division reassign this case to another judge sitting in the Criminal Division.

P-3

HAROLD L. CUSHENBERRY, JR.
JUDGE

Signed in Chambers

COPIES MAILED TO:

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Grant Anderson
A.K.A Jibril L. Ibrahim
502 S. Cedar Street
Pearsall, Texas 78061

APPENDIX (App. 4a)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division

UNITED STATES OF AMERICA :
:
v. : Case No. F7226-86
: Appeal No.91-1254
GRANT ANDERSON :

ORDER

This matter is before the Court on defendant's Motion for Extension of Time to File a Notice of Appeal nunc pro tunc to October 22, 1991.

On July 29, 1991, this Court denied defendant's Motion for New Trial.

On August 28, 1991 this Court denied defendant's Motion for Relief from Judgment or Order, defendant's Supplement to Rule 60 Motion as well as defendant's Motion for Leave to Take an Interlocutory Appeal.

On October 7, 1991 this Court denied defendant's Motion to Alter or Amend Judgment and Affidavit for Disqualification or Recusal. Defendant now moves for an extension of time to file a notice of appeal from each order denying defendant's motion.

D.C. App. R. 4 (b)(1) requires that a notice of appeal in a criminal case be filed with the Clerk of the Superior Court within thirty days after entry of the judgment or order from which the appeal is taken...[1]

[1] Defendant's notice of appeal from the October 7, 1991, order was timely filed pursuant to D.C. App. R. 4 (b)(1) and is therefore moot.

ATTACHMENT "B"

D.C. App. R. 4 (b)(3) provides that, upon a showing of excusable neglect, the Superior Court may, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed thirty days from the expiration of the time prescribed in D.C. App. R. 4 (b)(1). Because the defendant is incarcerated and was without counsel when he filed his pro se notice of appeal, his tardiness in filing his notice of appeal from the August 28, 1991, order is excusable. See Butler v. United States, 388 A.2d 883 (D.C. 1978).

Pursuant to D.C. App. R. 4 (b)(1) defendant's notice of appeal from the July 29, 1991 order was to be filed no later than August 28, 1991. Assuming arguendo that excusable neglect is found to exist with respect to this motion, defendant's filing of the notice of appeal on October 22, 1991 is not in compliance with the filing requirements of D.C. App. R. 4 (b)(3).

WHEREFORE, it is this 26th day of February, 1992,

ORDERED, that the requested Extensions of Time to File Notice of Appeal nunc pro tunc to October 22, 1991, from the August 28, 1991, order be, and hereby is, granted and it is

FURTHER O. ERED, that the requeste xtension of Time to File Notice of Appeal nunc pro tunc to October 22, 1991, from the July 29, 1991 order be, and hereby is, denied.

JUDGE ROBERT A. SHUKER

Copies to:

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6206 Adelaide Drive
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555 4th Street N.W.
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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No. F-7226-88
	:	
GRANT ANDERSON	:	

ORDER

This matter is before the Court on Defendant's pro se Motion to Vacate, Set Aside or Correct Sentence, received in chambers on December 14, 1992.

In September 1988, defendant's jury trial concluded with a verdict of guilty on all counts of the charge. After the verdict was appealed and remanded for sentencing, this Court on March 11, 1991, sentenced defendant to two (2) concurrent terms of incarceration of fifteen (15) years to life, and one term of forty (40) months to ten (10) years to be served consecutive to the other two.[1] Since that date defendant's efforts to reduce his sentence, while unavailing, have been unceasing.[2] This latest attempt to modify the sentence is based on a claim of ineffective assistance of appellate counsel. However, the merits of defendant's latest motion are not for this Court to decide. Claims of ineffective assistance of appellate counsel must be presented directly to the Court of Appeals by a motion recall the mandate. Griffin v. United States, 598 A.2d 1174 (D.C. 1991).[3]

WHEREFORE, it is this 1st day of ~~February~~ March, 1993,

ORDERED, that the defendant's pro se Motion to Vacate, Set Aside or Correct Sentence be, and hereby is, DENIED.

JUDGE ROBERT A. SHUKER

Copies to:

Grant Anderson
#166-978
Occoquan II Facility
P.O. Box 85
Lorton, VA 22199

United States Attorney's Office
Felony Trial Section

[1] Defendant was convicted of assault with intent to commit rape while armed, armed burglary, and assaulting a police officer while armed.

[2] Defendant's most recent motion to vacate, set aside or correct sentence was denied by this court on September 9, 1992.

[3] As such motions must be made within 180 days of the issuance of the mandate, defendant's motion is also untimely. D.C. App. R. 41(c). The mandate was issued June 25, 1990.

APPENDIX (App. 6a)

SUPERI[illegible] COURT OF THE DISTRICT O[illegible] COLUMBIA

SPECIAL PROCEEDINGS SECTION

JIBRIL LUQMAN IBRAHIM AKA GRANT ANDERSON	:	
Petitioner	:	
v.	:	Case No. SP554-93
BERNARD BRAXTON, Administrator:		
Respondents	:	

O R D E R

This matter is before the Court on a pro se petition for Writ of Habeas Corpus filed pursuant to Title 16, §1901 of the District of Columbia Code.

It is settled that "[w]hile habeas coprus is an appropriate remedy for one held in custody in violation of the Constitution, the ... Court should withhold relief in [a] collateral habeas corpus action where an adequate remedy [otherwise] available has not been exhausted. "Stack v. Boyle, 342 U.S. 1, 6-7 (1951), and as noted below a remedy may be available through a post trial motion filed in petitioners criminal case.

The Court views the allegations in the petition to be more properly the subject of a post trial motion to vacate sentence, pursuant to Title 23, §110 of the District of Columbia. Accordingly, it is this 15th day of March, 1993,

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A TRUE COPY
TEST: 3-17-93
Clerk, Superior Court of the
District of Columbia
By [signature]
Deputy Clerk

ORDERED, that the petition for Writ of Habeas Corpus be, and hereby is, denied; and

Further, the Clerk is directed to forward the petition to the Felony Branch of the Criminal Division for consideration by the appropriate judge.

JOHN R. HESS
JUDGE

Copies mailed to:

JIBRIL LUQMAN IBRAHIM
AKA GRANT ANDERSON
P.O. Box 85
Lorton, Virginia 22199

DISTRICT OF COLUMBIA COURT OF APPEALS

FILED FEB 28 1990
DISTRICT OF COLUMBIA COURT OF APPEALS
Richard B. Hoffman
Clerk

No. 88-1522

GRANT ANDERSON, Appellant,

v. CR F-7226-88

UNITED STATES, Appellee.

Appeal from the Superior Court of the
District of Columbia

(Hon. Reggie B. Walton, Trial Judge)

(Argued February 26, 1990 Decided February 28, 1990)

Before: NEWMAN, FERREN, and STEADMAN, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

A jury convicted appellant of assault with intent to commit rape while armed, D.C. Code § 22-501, -3202 (1989), assaulting, resisting, or interfering with a police officer with a dangerous weapon, *id.* § 22-505(b) (1989), and two counts of first degree burglary while armed, *id.* § 22-1801(a) (1989), one count predicated on intent to commit assault and the other count predicated on intent to steal property. [R. 85] Appellant contends on appeal that the trial court erred in denying his motions for mistrial and for judgment on acquittal and that the prosecutor's rebuttal argument was improper, constituting prosecutorial misconduct. We remand, directing the trial court to vacate one of the burglary convictions, and in all other respects affirm.

P-5

I.

At approximately midnight on June 21, 1988, at 2730 Wisconsin Avenue, N.W., Apartment 9, the complaining witness awoke when someone put a sharp object in her back. She turned over and started to scream. A man with a knife was standing over her bed. He told her to shut up and kept shoving a dish rag in her mouth, which she kept throwing out. She continued to scream. After a few minutes, she got "up on her feet and struggled in an attempt to get away," but the intruder knocked her to the floor. As she kicked and screamed, he pulled off her underpants, held a knife to her throat, and "was going to unzip his pants and get himself out of his pants." At this point, the police began "pounding" on the door, calling "Police."[1] The intruder "bolted from the room" and "out the living room window." The complaining witness bolted to the door and let in Officers Cabala and Williams.

After the complaining witness indicated to the officers that the intruder went out the window, Officer Cabala radioed to Officer Bradford, "[H]e's coming out," and began to climb out the window himself. Officer Bradford had positioned himself below the window from which he heard screaming. As he heard Officer Cabala radio the intruder's exit, he "saw a man come flying through the window and land on the roof." As the man was approaching the edge of the roof where Officer Bradford was standing, Bradford "saw he had a large knife in his hand." Bradford drew his revolver and "pointed it at him and told him to

[1]The police were responding to a "911" call made by another resident of the building who, after hearing a loud noise, looked out her window and saw a man inside apartment 9 "holding a screen in his hand and propping it up against the window pane[,] see the opening, and turn and disappear from view into the room."

I CERTIFY THAT THIS IS A TRUE COPY
RICHARD B. HOFFMAN
Clerk of the District of Columbia Court of Appeals
BY

'Hold it. Put your hands up,' and he came directly to the edge of the roof and jumped off." As the man jumped off the roof, Bradford shot him. The witness who saw the intruder in the window of apartment 9 and summoned the police, see *supra* note 1, also saw him "hoist[] himself out through the window and dash[] across the roof." As he jumped off the roof, she saw "his body intersect[] one shot from the ground."

Bradford and Cabala identified appellant at trial as the man whom Bradford shot. The complaining witness, however, was not able to identify appellant because, when she saw him, a cloth was covering part of his face. The witness who saw him in the window and running across the roof also did not identify appellant in court.

The complaining witness realized after the assault that her purse, which was on a chair in the living room, was overturned and her wallet was missing. She also discovered that her telephone had been unplugged. The police found her wallet in appellant's back pocket when they searched him for identification.

II.

During the prosecutor's opening statement at trial, he referred to a "911" call made at approximately 10:30 p.m. on the night of the assault by the same witness who made the call at midnight. See *supra* note 1. Both calls were complaints about a prowler on the roof. Following defense counsel's opening statement, the trial court *sua sponte* voiced his concern about the use of "other crimes evidence,"[2] should the prosecutor suggest that the defendant was connected to the 10:30 incident. Defense counsel subsequently objected to the reference to an earlier prowler and requested and received an instruction to the jury "to disregard that reference, because we don't know who that person was. . . . And there is no evidence whatsoever to suggest that the defendant was the person who sought to try and enter" that witness'[3] apartment."

Despite the fact that the prosecutor had cautioned her not to mention the prowler on the roof at 10:30, the witness who made these calls testified, during cross examination, that when she called the police at midnight she said, "He's back. He's back again and this time he's inside." The trial court denied defense counsel's motion for mistrial based on this testimony and immediately instructed the jury: "As I indicated to you earlier, no one saw who was out there before, and therefore, just as you have to disregard what [the prosecutor] said, you have to disregard what this witness said, because it would be guesswork to presuppose that whoever was out there earlier was in fact the same person who was out there later."

Appellant contends the trial court erred in denying his mistrial motion. We review trial court's decision for abuse of discretion and conclude no such abuse occurred here, especially in view of the fact that the witness at issue was not the complaining witness and that the intruder incident to which she referred was not the one for which appellant was on trial. *See Beale v. United States*, 465 A.2d 796, 799 (D.C. 1983) ("The decision on whether a mistrial should be declared has always been committed to the sound discretion of the trial court."), *cert.*

[2]*See Drew v. United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964).

[3]The trial court was referring to the witness who made the calls, not the complaining witness.

denied, 465 U.S. 1030 (1984).

III.

Appellant also contends that the evidence of specific intent to rape was insufficient and that the trial court erred in denying his motion for judgment of acquittal. Appellant cites several cases in support of this contention. However, in those cases the court found the evidence of specific intent to rape insufficient because evidence of force or threats was not present. *See United States v. Tremble*, 152 U.S. App. D.C. 363, 365, 470 F.2d 1272, 1274 (1972) ("no evidence that he intended by force and violence and against the woman's consent to achieve penetration"); *Baber v. United States*, 116 U.S. App. D.C. 358, 360 324 F.2d 390, 392 (1963) (where "[t]he intruder made no threats," "apart from tearing her skirt, [] did not use physical force or violence" and fled when complaining witness pushed him off), *cert. denied*, 376 U.S. 972 (1964); *Hammond v. United States*, 75 U.S. App. D.C. 397, 398, 127 F.2d 752, 753 (1942) ("In the instant case, it can just as well be assumed that appellant's purpose was to look or to fondle or to have intercourse if consent were forthcoming, rather than to ravish."). In contrast to these cases, the complaining witness testified that appellant wielded a knife and that -- in the face of her screams, kicks, and attempts to flee -- he tore off her underpants and prepared to rape her.

In reviewing a claim of evidentiary insufficiency, we consider the evidence in the light most favorable to the government and determine whether a reasonable juror could find guilt beyond a reasonable doubt. *Brown v. United States*, 546 A.2d 390, 393-394 (D.C. 1988); *Curry v. United States*, 520 A.2d 255, 263 (D.C. 1987). We conclude the evidence supports the finding by a reasonable juror that appellant had the specific intent to rape the complaining witness when he assaulted her. Thus, the trial court did not err in denying appellant's motion for judgment of acquittal.

IV.

Appellant contends, finally, that the prosecutor's remarks during rebuttal argument amounted to prosecutorial misconduct. During rebuttal, the prosecutor argued that the officers who testified, particularly Officers Cabala and Bradford, were credible based on their long careers on the police force. According to the prosecutor, these men would not jeopardize their careers and retirement pensions by lying to the jury. These remarks must be taken in the context of the entire trial. Beginning with the opening statement, continuing through cross-examinations of Officer Cabala and Officer Bradford, and ending with closing argument, defense counsel probed, questioned, and argued the possibility that Officer Bradford had made a mistake in shooting appellant and had to cover-up that error.

Because defense counsel did not object to the prosecutor's challenged remarks on rebuttal, we evaluate the claim of error under a "plain error" standard of review. *See Watts v. United States*, 362 A.2d 706, 708 (D.C. 1976) (en banc). We conclude, however, that in context there was nothing improper about the prosecutor's continued efforts to rebut defendant's theory, reiterated in his closing argument, of a cover-up.[4] Accordingly, there was no error, let alone plain error, in the trial court's failure *sua sponte* to declare a mistrial.

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[4]The prosecutor argued in his initial closing argument that nothing was being covered up. Defense counsel does not contend that these comments were improper.

Appellant's reliance on *Hinkel v. United States*, 544 A.2d 283 (D.C. 1988), does not persuade us otherwise. In *Hinkel*, this court concluded that the prosecutor's remarks rehabilitating the credibility of a police officer witness "bordered on the impermissible" but did not amount to plain error. *Id.* at 286. We are confident that, in the case, the prosecutor permissibly contrasted the credibility of officers Bradford and Cabala with that of appellant in attempts to rehabilitate (after attack by the defense) the officers' credibility. The prosecutor's remarks focused on the possible motivations the officers, as opposed to the defendant, might have had to lie and did not make "an improper statement regarding the inherent credence owed a police officer's testimony." *Id.*

V.

One final issue, not raised by appellant, but conceded by the government, is that of remand to the trial court so that one of the burglary convictions may be vacated. We agree that the burglary convictions -- based, as they are, on a single act of entry -- cannot both stand. *See Thorne v. United States*, 471 A.2d 247 (D.C. 1983).

Accordingly, it is

ORDERED AND ADJUDGED, that the judgment on appeal here be, and it is hereby remanded to the trial court to vacate one of the two burglary convictions and in all other respects is affirmed.

FOR THE COURT:

Richard B. Hoffman

RICHARD B. HOFFMAN,
Clerk

Copies to:

Clerk, Superior Court

J. Herbie DiFonzo, Esq.
110 N. Royal Street, #200
Alexandria, VA 22314

John R. Fisher, Esq.
Assistant U.S. Attorney

District of Columbia
Court of Appeals

No. 88-1522

GRANT ANDERSON,

Appellant,

v.

F7226-88

UNITED STATES,

Appellee.

BEFORE: Ferren and Steadman, Associate Judges; and Newman, Senior Judge.

O R D E R

On consideration of the pro se petition for rehearing or rehearing en banc filed by appellant, it is

ORDERED that the petition is granted only to the extent that Elaine Mittleman, Esquire, is hereby appointed by this court to represent appellant with respect to all motions filed by appellant on March 31, 1990, and thereafter.

PER CURIAM

Copies to:

PETITIONER'S EX. B

Honorable Reggie B. Walton

Clerk, Superior Court

Mr. Grant Anderson
DCDC #166-978
502 South Cedar Street
Pearsall, Texas 78061

Elaine Mittleman, Esquire
2040 Arch Drive
Falls Church, VA 22043

John R. Fisher, Esquire
Assistant United States Attorney

sl

APPENDIX (App. 9a)

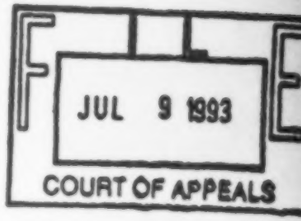
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 91-CO-1254 & 92-CO-302

GRANT ANDERSON,
APPELLANT,
CR F-7226-88

v.

UNITED STATES,
APPELLEE.



Appeal from the Superior Court of the
District of Columbia
Criminal Division

(Hon. Robert A. Shuker, Motions Judge)

(Argued October 30, 1992 Decided July 9, 1993)

Before STEADMAN, WAGNER and KING, *Associate Judges*.

MEMORANDUM OPINION AND JUDGMENT

Grant Anderson appeals from the denial by Superior Court Judge Robert A. Shuker of several *pro se* motions submitted between June, 1991, and September, 1991, collaterally attacking his 1988 criminal convictions. In particular, he appeals from 1) the denial on July 29, 1991, of appellant's Motion for a New Trial Newly Discovered Evidence; 2) the denial on August 28, 1991, of a) appellant's Motion for Relief from Judgment or Order, b) Defendant's Supplement to Rule 60 Motion, c) Defendant's Praecipe and Supplemental Issues and Memorandum of Law in Support of Defendant's Praecipe and Supplemental Issues, d) appellant's Motion for Leave to Take an Interlocutory Appeal In Forma Pauperis and the separate denial of appellant's Motion for Appointment of Counsel; and 3) the denial on October 7, 1991, of appellant's Motion to Alter or Amend Judgment and of appellant's Affidavit for Disqualification or Recusal of Judge Robert A. Shuker.[1] Given the procedural complexity of this appeal and its relation to the direct appeal of the convictions, affirmed by this court in 1990, we have determined to set forth and discuss appellant's numerous assertions in some detail. However,

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[1] Two separate appeals were consolidated: No. 91-CO-1254 and No. 92-CO-302. The second appeal concerned the partial denial by Judge Shuker on February 26, 1992, of appellant's motion entitled "Defendant's Motion for Extension of Time to File Notice of Appeal." Because it is not now contested that the July 29, August 28, and October 7, 1991, orders are validly before us on appeal, we need not review the February 26 order.

ATTACHMENT "C"

is a further series of collateral attacks on his convictions made in motions filed in mid-1991.

Relevant Legal Doctrines

We begin by stating the well-settled principles of law that are applicable to this case. Although appellant's various motions have different titles, because he is challenging his conviction collaterally, the body of law surrounding a § 23-110 motion generally applies. In *Head v. United States*, 489 A.2d 450 (D.C. 1985), this court stated that § 23-110 is not designed to be a substitute for direct review noting that if it were, a final judgment would be of no significance. Rather, § 23-110 relief is "appropriate only for serious defects in the trial which were not correctable on direct appeal or which appellant was prevented by exceptional circumstances from raising on direct appeal." *Head*, 489 A.2d at 451. If a defendant fails to raise an available challenge to his conviction on direct appeal, he cannot raise the issue on collateral attack without showing cause for his failure to raise it and prejudice because of it. *Id.*

One of appellant's motions now on appeal is his Motion for a New Trial Newly Discovered Evidence -- thus the standards for review of the denial of such a motion apply as well. We review a judge's decision in a motion for a new trial based on newly discovered evidence only for an abuse of discretion. *Townsend v. United States*, 549 A.2d 724, 726 (D.C. 1988), *cert. denied*, 490 U.S. 1102 (1989). In order to prevail, a defendant must show that

> "(1)[] the evidence was newly discovered since trial; (2)[the defendant] has demonstrated diligence in [his] efforts to procure the evidence; (3)[] the evidence is [not] merely cumulative or impeaching; (4)[] the evidence is material to the issues involved; and (5)[] the evidence is of such a nature that an acquittal would likely result from its use."

Id. (citing *Smith v. United States*, 466 A.2d 429, 432 (D.C. 1983) (citing *Heard v. United States*, 245 A.2d 125, 126 (D.C. 1968))).

Lastly, appellant's collateral motions were denied without a hearing and without the assistance of counsel, thus, the interrelated body of law surrounding the standards for hearings and counsel appointment apply. The Sixth Amendment right to counsel includes a right of indigent criminal defendants to have counsel appointed. *Gideon v. Wainwright*, 372 U.S. 335 (1963). However, there is no constitutional right to appointed counsel in post conviction proceedings. *Coleman v. Thompson*, __ U.S. __, 111

A.

Appellant's first claim was that he had "newly discovered evidence" that Officer Bradford (the police officer who shot appellant on the night of the complainant's attack) "perjured" himself at appellant's trial. In support, appellant stated that he filed a civil action against Officer Bradford in the United States District Court for the District of Columbia and submitted requests for admissions to Officer Bradford. The request allegedly asked whether Officer Bradford had committed perjury during his testimony in defendant Anderson's criminal trial. Appellant claims that Officer Bradford failed to respond to the request for admissions and appellant alleges that this is an admission of perjury in that under FED. R. CIV. P. 36, anything not denied in a timely way is deemed admitted.

This proffer of allegedly new evidence was plainly insufficient to support a collateral attack or to suggest that its use would likely affect a new trial. Appellant does not allege in what way Officer Bradford perjured himself or on what issue. He does not give documentation of the request for admission or its exact language. Appellant does not even proffer evidence of what the civil suit in federal court was about, nor is there any indication that the request for admission was ever properly served in the federal case.[5] There is no factual basis that Officer Bradford lied in a way material to appellant's defense or to the government's evidence. Additionally, Rule 36 itself states and commentators note that the request for admission is deemed admitted for the purposes of that proceeding only.[6] *See* 8 WRIGHT AND MILLER, *supra* note 5, § 2264 ("Any admission

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[5] A party who wants the fact that another party to the lawsuit failed to deny a request for admissions to be deemed admitted must give proof of service of a proper request and of a failure to respond to the request. 8 CHARLES A. WRIGHT AND ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2264 (1970). Appellant has not proffered any evidence that he took these steps in the civil action, thus, he has not even shown that the "admission" could be used in the civil suit, much less in this appeal.

[6] FED. R. CIV. P. 36 provides in relevant part:

> (a) **Request for Admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) . . . . The matter is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon

(continued...)

c.

Appellant further claimed that a) several jurors were biased in that they were influenced by other jurors to change their verdicts and b) the prosecutor engaged in misconduct 1) by "arguing guilt from flight without first obtaining advance notice and permission from the trial court"; 2) by indicating that appellant's mother and friend would lie to protect him; and 3) by not providing exculpatory evidence (a statement by the complaining witness that the assailant was "light skinned with brown hair") to the defendant. The jury bias claim and the first two prosecutorial misconduct claims are not newly discovered evidence, *see Townsend*, 549 A.2d at 726, and were not raised on direct appeal. Appellant showed neither cause for not bringing the claims on direct appeal nor prejudice, *see Head*, 489 A.2d at 451, and in any event these claims would appear to form no basis for a new trial.

The claim that the prosecutor suppressed exculpatory evidence should likewise have been brought on direct appeal; appellant knew of the existence of this evidence at trial as evidenced by his original § 23-110 Motion to Vacate before Judge Cushenberry. But the claim of suppression would have been futile. The § 23-110 motion itself identifies the information as having in fact been contained in *Jencks* material furnished by the government and asserts that his trial counsel was ineffective in part for the very reason that she failed to handle this information properly. Thus, appellant's own assertion belies any notion of prejudicial concealment. (It should be noted that although the complainant said at trial that her assailant was black, she did not purport to make any identification of appellant himself.)

Insofar as the claim relates to trial counsel's handling of this information, appellant raised the issue before Judge Cushenberry and the failure to appeal the denial of relief for alleged ineffective assistance of counsel gives that ruling finality on that ground. *See* D.C. Code § 23-110(e) (1989); *Hurt v. St. Elizabeth's Hospital*, 366 A.2d 780, 781 (D.C. 1976). Judge Cushenberry thoroughly discussed the general issue of ineffectiveness of trial counsel in a memorandum opinion and order, concluding that even assuming *Shepard*[8] considerations were no bar to plenary review, defense counsel's performance was not constitutionally deficient and even if it were, appellant had not established a reasonable possibility that he would have been

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[8] *Shepard v. United States*, 533 A.2d 1278 (D.C. 1987).

not follow the procedure of filing a § 23-110 motion during the pendency of the direct appeal and is thus now subject to the cause and prejudice standard. He has shown neither in his appeal.

In any event, appellant in fact was able to challenge the adequacy of trial counsel in his § 23-110 Motion to Vacate denied by Judge Cushenberry on July 26, 1990, in a written analysis from which no appeal was taken. That motion made numerous allegations of ineffectiveness, in many instances overlapping his assertions before Judge Shuker. This provides another basis of denying his claim now. By the express terms of § 23-110, the trial court "shall not be required to entertain a second or successive motion for *similar* relief on behalf of the same prisoner." D.C. Code § 23-110(e) (emphasis added). In *Hurt*, 366 A.2d at 781, this court made note of the provisions of § 23-110(e) in holding that "[t]o the extent that the allegations in the motion merely repeat the previously rejected contentions in the habeas corpus petition, they need not [be] considered by the trial court judge." Thus, appellant's assertions of ineffectiveness that were repetitive of those made before Judge Cushenberry were clearly deniable on this basis, and to the extent that new allegations were properly raised, they could fairly be challenged as vague and conclusory or otherwise affording no ground for further action.[10]

Motions Denied on August 28, 1991

A.

In appellant's "Motion for Relief from Judgment or Order," appellant repeated some of the claims asserted in the new trial motion denied on July 29, 1991, and argued that Judge Shuker improperly relied on *Godfrey v. United States*, 454 A.2d 293, 299 n.18 (D.C. 1982), which describes the standards for a motion for a new

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[10] Any claim of ineffective assistance of appellate counsel was not properly before the trial court. *See Watson v. United States*, 536 A.2d 1056 (D.C. 1987) (en banc), *cert. denied*, 486 U.S. 1010 (1988). On August 26, 1991, appellant filed a petition for rehearing or rehearing en banc in the direct appeal and counsel was subsequently appointed to represent him in connection with that motion as well as all other matters on direct appeal from March 31, 1990, and thereafter. All the claims raised in that petition, as supplemented, are effectively dealt with and disposed of in this memorandum opinion and judgment.

in misconduct during the grand jury session in allegedly not presenting exculpatory evidence (the same evidence that was alleged in the motion for a new trial); 3) the prosecutor badgered and intimidated a witness; 4) the trial court erred in denying a lesser included offense instruction, and 5) his trial counsel was ineffective for various reasons. Again, appellant did not show cause for failing to raise these issues on direct appeal nor prejudice.[13] *See Head*, 489 A.2d at 451. Additionally, these claims fail in that there is nothing that is newly discovered since trial. *See Townsend*, 549 A.2d at 726.

C.

In his Application for Appointment of Counsel (filed August 19, 1991, and denied August 28, 1991) appellant appears to request the assistance of appointed counsel to assist him with his ineffective assistance claim. However, as already indicated, neither this claim nor any of his other assertions of error were sufficient to require the appointment of counsel under the criteria of *Jenkins*, and the trial court did not abuse its discretion in denying the motion.

Motions Denied on October 7, 1991[14]

Appellant filed an "Affidavit for Disqualification or Recusal of Judge Robert A. Shuker."[15] In support, appellant stated that he appeared before Judge Shuker in a trial where he was accused of various robberies. He states that the jury found appellant "not guilty." Allegedly Judge Shuker thereafter told appellant's counsel at the time that appellant had "pulled a fast one" and that if appellant ever appeared before the Superior Court again, he would handle the case personally. Appellant alleged that Judge Shuker had "taken on a vindictive approach" against him in the current case.

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[13] The additional ineffectiveness of trial counsel claim fails for the same reasons as his other ineffectiveness claims. See, *supra*.

[14] For the disposition on appeal of appellant's Motion to Alter or Amend Judgment, see note 11, *supra*.

[15] Judge Shuker was assigned to appellant's case after Judge Cushenberry recused himself on July 18, 1991.

the penalty of perjury that the allegations were true and made in good faith.[17]

Moreover, appellant's filing of the "affidavit" in this case was untimely. "In general, motions to recuse must be filed at the first opportunity after discovery of the facts tending to prove disqualification." *Sine v. Local No. 992 Int'l Bhd. of Teamsters*, 882 F.2d 913, 915 (4th Cir. 1989).[18] Appellant knew at least as of August 7, 1991, that Judge Shuker was the judge assigned to his case,[19] yet it was not until September 5, 1991, -- after Judge Shuker had ruled against him on several of the motions now on appeal -- that appellant sought to have Judge Shuker recused. We agree with the Fourth Circuit that to allow "a party to gather evidence of a judge's possible bias and then wait and see if the proceedings went his way before using the information to seek recusal" would encourage abuse of the recusal motion. *Sine*, 882 F.2d at 916. Thus, the Motion to Recuse was properly denied.

For the foregoing reasons, the rulings on appellant's motions on appeal are hereby affirmed.

For the Court:

William H. Ng. Clerk

Copies to:

Honorable Robert A. Shuker

Clerk, Superior Court

Robert J. Dowlut, Esquire
9200 Bulls Run Parkway
Bethesda, MD 20817

John R. Fisher, Esquire
Assistant United States Attorney

ac

[17] It is not asserted that Judge Shuker's alleged statements were made in open court on the record.

[18] Rule 63-I follows the language of 28 U.S.C. § 144. Thus, we look to the cases under that statute to construe Rule 63-I. *In re Evans*, 411 A.2d 984, 994 n.11 (D.C. 1980).

[19] On that date, appellant signed a certificate of service alleging that he mailed his filing entitled "Defendant's Supplement to Rule 60 Motion" to the Superior Court. Judge Shuker's name was on the heading of that document.

APPENDIX (App. 10a)

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-CF-1522

GRANT ANDERSON,
APPELLANT,
CR F-7226-88

v.

UNITED STATES,
APPELLEE.

Before: ROGERS, *Chief Judge*; *FERREN, TERRY, *STEADMAN, SCHWELB, **FARRELL, WAGNER, KING, and SULLIVAN, *Associate Judges*; and *+NEWMAN, *Senior Judge*.

O R D E R

On consideration of appellant's *pro se* "Petition for Rehearing or Rehearing En Banc," of appellate counsel's "Supplemental Memorandum in Support of Appellant's Petition for Rehearing,"[1] and of appellant's *pro se* "Motion for Appointment of Counsel and Motion to Withdraw Counsel," it is

ORDERED by the merits division* that the motion is denied, *see Wise v. United States*, 522 A.2d 898 (D.C. 1987), and it is

FURTHER ORDERED by the merits division* that the petition for rehearing is denied. *See Anderson v. United States*, Nos. 91-CO-1254 & 92-CO-302, Memorandum Opinion and Judgment (D.C. July 9, 1993).

No judge of this court having called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED, on behalf of the en banc court, that the petition for rehearing en banc is denied.

Per Curiam.

** *Associate Judge* FARRELL has recused himself from this case.

+ *Senior Judge* NEWMAN participated only as a member of the merits division.

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[1] On November 14, 1991, following the filing of appellant's *pro se* petition, the merits division appointed Elaine Mittleman, Esquire, "to represent appellant with respect to all motions filed by appellant on March 31, 1990, and thereafter."

No. 88-CF-1522

Copies to:

J. Herbie DiFonzo, Esquire
110 North Royal Street Suite 200
Alexandria, VA 22314

Elaine J. Mittleman, Esquire
2040 Arch Drive
Falls Church, VA 22043

John R. Fisher, Esquire
Assistant United States Attorney

ac

FILED

APR 22 1991

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT ANDERSON,

Plaintiff

v.

WALTER RIDLEY,

Defendant

Civil Action No. 91-182

MEMORANDUM OPINION

Petitioner brings this action for a writ of habeas corpus on the grounds that he was denied various constitutional rights during his criminal trial and was ineffectively assisted by counsel. Having considered the petition and the government's response thereto, this Court shall deny the petition for lack of subject matter jurisdiction.

DISCUSSION

On September 7, 1988, petitioner was convicted in the District of Columbia Superior Court of assault with intent to rape while armed, burglary while armed, assault, and interfering with a police officer while armed. Petitioner appealed his conviction to the District of Columbia Court of Appeals, which vacated one count and affirmed the remaining counts on February 28, 1990. Petitioner has filed in Superior Court a motion to vacate his sentence under D.C. Code Ann. § 23-110, claiming ineffective assistance of counsel, prosecutorial misconduct, and inaccuracy of trial transcripts. Although no decision has been rendered with respect to that motion, petitioner now brings his claims before this Court.

Ex. #1

(N)

AO 72A
(Rev. 8/82)

11

The jurisdiction of a federal court over a petition for a writ of habeas corpus sought by a person convicted in Superior Court is limited by the availability of a collateral remedy in the District of Columbia courts. Swain v. Pressley, 430 U.S. 347 (1977). By statute, a District prisoner may make a motion for release on the grounds that:

> (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, [or] (4) the sentence is otherwise subject to collateral attack.

D.C. Code Ann. § 23-110(a). The statute provides that a federal court shall not entertain a habeas corpus petition "if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." D.C. Code Ann. § 23-110(g). Thus, the statute requires a petitioner to exhaust his local remedies, but even if he has done so and been unsuccessful, the statute precludes federal review "unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." Id. See Garris v. Lindsay, 794 F.2d 722, 727 (D.C. Cir 1986), cert. denied, 465 U.S. 1012 (1984) ("It is the inefficacy of the remedy, not a personal inability to utilize it, that is determinative . . . ."); Swain v. Pressley, 430 U.S. 372, 377 (1977) (holding that "the statute expressly covers the

AO 72A
(Rev. 8/82)

situation in which the applicant has exhausted his local remedies, and requires that the application be denied in such a case").

Petitioner has nowhere alleged that he has been "deprived of a full and fair opportunity to litigate a colorable claim in the District of Columbia courts." Garris, 794 F.2d at 727. His claims before the Superior Court have not yet been determined. He claims instead that the remedy available from that court is inadequate and ineffective because the "time to note an appeal has long expired for certiorari." Petitioner's Response at 2. Although the Court is unclear how this allegedly precludes a remedy under D.C. Code Ann. §23-110, the Court is well aware that it is not a petitioner's inability to utilize a remedy that makes it ineffective. Garris, 794 F.2d at 727. Because petitioner has not exhausted his local remedies and has not shown that his local remedies are inadequate or ineffective, the Court must deny petitioner's application for a writ of habeas corpus and dismiss this action for lack of subject matter jurisdiction.

Dated: April 19, 1991

Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT ANDERSON,

Plaintiff

Civil Action No. 91-182

WALTER RIDLEY,

Defendant

ORDER

On June 24, 1991, plaintiff submitted a motion for reconsideration of the Court's April 22, 1991 Order denying plaintiff's petition for a writ of habeas corpus. The motion was submitted over 60 days after the issuance of the Court's Order, well after the time for such a motion and well after the time for filing a notice of appeal. Accordingly, it is this 16th day of July, 1991,

ORDERED that plaintiff's motion for reconsideration is hereby DENIED.

P-18

Thomas F. Hogan
United States District Judge

16

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Grant Anderson,
Petitioner,

v.

Gloria Cubriel,
Respondent.

Civil Action No. 92-1972-LFO

O R D E R

This matter comes before the Court upon petitioner's petition for a Writ of Habeas Corpus. Having allowed this matter to proceed without prepayment of costs, we nevertheless dismiss for the following reasons.

Petitioner is incarcerated pursuant to a sentence imposed by the Superior Court of the District of Columbia. Because this Court lacks jurisdiction to entertain the petition, the petition will be dismissed.

Section 2254 provides, in pertinent part:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

Although the District of Columbia is not a state, Congress has provided prisoners incarcerated pursuant to a Superior Court sentence with a local remedy in the District of Columbia Code § 23-110. This section provides that prisoners may collaterally challenge the legality of their sentence directly in the Superior Court, and if unsuccessful, by appeal to the District of Columbia Court of Appeals. See Garris v. Lindsay, 794 F.2d 722, 725 (D.C. Cir. 1986). The Court of Appeals has further declared that "a District of Columbia prisoner has no recourse to a federal judicial forum unless the local remedy is 'inadequate or ineffective to test the legality of his detention.'" Id. Section 23-110 has been found to be adequate and effective because it is co-extensive with habeas corpus. See id., Swain v. Pressley, 430 U.S. 372, 377-82 (1977). Petitioner's recourse, therefore, lies in the first instance in the D.C. Superior Court; this Court lacks jurisdiction to hear this petition.

Accordingly, the petition is DISMISSED, sua sponte.

SO ORDERED.

Louis F. Oberdorfer
United States District Judge

June 16, 1993
Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

MAY 28 1993

CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

In the Matter of
Grant Anderson

Civil Action 93-1057

O R D E R

Petitioner, proceeding pro se has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. He is presently incarcerated pursuant to a sentence imposed by the Superior Court of the District of Columbia. Having allowed the petitioner to proceed without prepayment of costs, we nevertheless dismiss the case on the grounds that this Court lacks jurisdiction to entertain the petition.

Section 2254 provides, in pertinent part:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the state to raise, by any available procedure, the question presented.

Although the District of Columbia is not a state, Congress has provided prisoners incarcerated pursuant to a Superior Court sentence with a local remedy in District of Columbia Code § 23-110. This section provides that prisoners may collaterally challenge the legality of their sentence directly in the Superior Court and, if unsuccessful, by appeal to the D.C. Court of Appeals. See Garris v. Lindsay, 794 F.2d 722, 725 (D.C. Cir. 1986). The Court of Appeals has further declared that "a District of Columbia prisoner has no recourse to a federal judicial forum unless the local remedy is 'inadequate or ineffective to test the legality of his detention.'" Id. Section 23-110 has been found to be adequate and effective because it is co-extensive with habeas corpus. See id.; Swain v. Pressley, 430 U.S. 372, 377-82 (1977). Petitioner's recourse, therefore, lies in the D.C. Superior Court; this Court lacks jurisdiction to hear this petition.

Accordingly, the petition is dismissed, sua sponte.

"C"

United States District Judge

14 May 93
Date

APPENDIX (App. 14a)

CO-2
Rev. 6/92

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Gabriel Thompson
Plaintiff

vs.

D.C. Dept. of Corrections
U.S. Attorneys Office
Defendant

ORDER

The papers in the above captioned matter are hereby returned to you for failure to comply with the Federal Rules of Civil Procedure and/or the Local Rules of this Court. The papers are deficient in the following respects:

[ ] The name of this Court must be written at the top of the first page and the word "COMPLAINT" must appear on the first page. Your COMPLAINT, must set forth the facts of your case and indicate what kind of relief you seek from the Court .

[ ] All the parties to the suit must be named in the caption and the caption must also contain the names and addresses of all the plaintiffs and defendants.

[ ] Your COMPLAINT must be legibly handwritten or typed. If you are requesting a jury trial, the jury demand may be stated in your complaint.

[ ] **You must sign your complaint.**

[ ] The fee for filing your complaint is $120.00. Please make your check or money order payable to "CLERK, U.S. DISTRICT COURT". If you cannot afford to pay the filing fee, you may ask the Court to permit you to proceed without prepayment of cost. To do this, you must complete and sign the attached affidavit and submit it with your original complaint. If you are permitted to proceed without prepayment of costs, the Clerk will deliver your papers to the U.S. Marshal for service.

[ ] Application to proceed without prepayment of costs must be completed and signed.

[ ] A Petition for Writ of Habeas Corpus or a Complaint under 42 USC §1983 submitted by anyone incarcerated in a District of Columbia Facility must be on Court Approved forms. The appropriate forms are enclosed.

(Continued on reverse side)

CO-217
Rev. 3/91
FPI-LEX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Grant Anderson
Plaintiff(s)

vs. Civil Action No. 94-0022

U.S.A.
Defendant(s)

Dear

In the above entitled cause, please be advised that on Jan. 5, 1994, Judge Oberdorfer endorsed thereon as follows:

"Leave to file without prepayment of costs granted

As a result of the Judge's ruling, your case has been filed and assigned to Judge Oberdorfer. All subsequent correspondence or pleadings must bear the civil action number referred to above, followed by the initials of the Judge assigned to your case. The Judge's initials can be found on the line immediately following their name as shown above.

NANCY MAYER-WHITTINGTON, CLERK

By: Mary B Deavers
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5293 September Term, 19 91
91-00182

Grant Anderson,

Appellant

v.

Walter Ridley

United States Court of Appeals
For the District of Columbia Circuit
FILED JUL 23 1992
CONSTANCE L. DUPRÉ
CLERK

BEFORE: Silberman and Randolph, Circuit Judges

O R D E R

Upon consideration of the motion for appointment of counsel, motion for status review, motion for expeditious process and briefing schedule, the motion for transmission of record, and treating the notice of appeal as including a request for a certificate of probable cause, it is

ORDERED that the motion for appointment of counsel be denied. Except in a criminal trial and on appeal therefrom, appointment of counsel is exceptional and is wholly unwarranted when appellant has not demonstrated any likelihood of success on the merits. See D.C. Circuit Handbook of Practice and Internal Procedures 29 (1987). It is

FURTHER ORDERED, on the court's own motion, that appellant show cause, within 30 days of the date of this order, why the appeal should not be dismissed for lack of jurisdiction. A certificate of probable cause is a jurisdictional prerequisite to an appeal by a state prisoner from the denial of a federal habeas petition and may be issued only upon a "substantial showing of the denial of a federal right." See Garris v. Lindsay, 794 F.2d 722, 725 (D.C. Cir.), cert. denied, 479 U.S. 993 (1986). To make such a showing, appellant must demonstrate that his remedy in D.C. Superior Court is "inadequate or ineffective." See D.C.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5293 September Term, 19 91

Code Ann. § 23-110(g); Swain v. Pressley, 430 U.S. 372, 384 (1977). An individual's personal inability to utilize the state remedy, however, does not render the remedy inadequate or ineffective. See Garris, 794 F.2d at 727. Failure to comply with this order will result in dismissal of the appeal for lack of prosecution. See D.C. Cir. Rule 23. It is

FURTHER ORDERED that consideration of the remaining motions be deferred pending further order of the court.

The Clerk is directed to send a copy of this order to appellant by whatever means necessary to ensure receipt.

Per Curiam

LHS
PAR

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 91-5293 September Term, 19 92

91cv00182

Grant Anderson,

Appellant

v.

Walter Ridley

BEFORE: Williams, Sentelle and Henderson, Circuit Judges

O R D E R

Upon consideration of appellant's response to the court's July 23, 1992 order to show cause, the motion for status review, the motion for expeditious process and briefing schedule, the motion for transmission of record, and treating the notice of appeal as including a request for a certificate of probable cause, it is

ORDERED that the order to show cause be discharged. It is

FURTHER ORDERED, on the court's own motion, that this appeal be dismissed for lack of jurisdiction. A certificate of probable cause is a jurisdictional prerequisite to an appeal by a non-federal prisoner from the denial of a federal habeas petition and may be issued only upon a "substantial showing of the denial of a federal right." See Garris v. Lindsay, 794 F.2d 722, 725 (D.C. Cir.), cert. denied, 479 U.S. 993 (1986). Appellant has failed to make such a showing because he has not demonstrated that his remedy in D.C. Superior Court is "inadequate or ineffective." See D.C. Code Ann. § 23-110(g); Swain v. Pressley, 430 U.S. 372, 384 (1977). It is

FURTHER ORDERED that the remaining motions be dismissed as moot. Because no appeal has been allowed, no mandate shall issue.

Per Curiam

SFW
DSW
KLH

APPENDIX (App. 17a)

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIR.

No. 93-7091 September Term, 1993

ORDERED that the motion for summary affirmance filed in No. 93-7091 be granted substantially for the reasons stated by the district court in its order filed April 26, 1993. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). It is

FURTHER ORDERED that the motion for summary reversal filed in No. 93-7091 be denied. It is

FURTHER ORDERED that the motion for summary affirmance filed in No. 93-7116 be granted in part. The amended complaint was properly dismissed for the reasons stated by the district court in its memorandum opinion filed June 16, 1993. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). It is

FURTHER ORDERED that the motion for summary reversal filed in No. 93-7116 be granted in part and the injunction filed June 16, 1993 be vacated and the case remanded for further proceedings. The record does not reflect whether the district court afforded Anderson the requisite notice and opportunity to be heard before entering the June 16, 1993 injunction. See In re Powell, 851 F.2d 427, 431 (D.C. Cir. 1988) ("due process requires notice and an opportunity to be heard" before the district court restricts frequent pro se filer's right of access to the court). It is

FURTHER ORDERED that the motion to consolidate be dismissed as moot.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

The Clerk is further directed to file a copy of this order in both of the above-captioned files.

"B"

Per Curiam

KLH - 2 - SFU

APPENDIX (App. 18a)

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001-2866

RON GARVIN
CLERK

GENERAL INFORMATION
(202) 273-0300

August 10, 1993

Grant Anderson
DCDC # 166-978
Occoquan Facility
P.O. BOX 85
Lorton, VA 22199

Re: 91-5293, Grant Anderson, Appellant vs. Walter Ridley

Dear Mr. Anderson:

The court received on August 9, 1993 your Petition for a Writ of Error or Corum Nobis. The submission is returned herewith. By order of this court entered September 17, 1992 (copy attached) the court dismissed this case. Nothing further can be done. Any further submissions will neither be returned nor acknowledged.

Sincerely

John T. Haley
Deputy Clerk

enclosure

APPENDIX (App. 19a)

ATTORNEY GENERAL JANET RENO
UNITED STATES DEPARTMENT OF JUSTICE
10th. & Constitution Avenue N.W.
Washington, D.C. 20530

93 1057

FROM: GRANT ANDERSON
DCDC # 166-978
P.O. Box 85
Lorton, Va. 22199

April 15, 1993

Dear Ms. Reno:

This letter is to represent the contentions and underpins my contentions that the United States District Court for the District of Columbia is refusing me the right to file my petition for a writ of habeas corpus to challenge my criminal convictions. I recently tendered to you copies of a pro se petition for a writ of mandamus to compel the district court to file my appeals as well as the fact that I have been unable to perfect my habeas corpus petitions to this court on three separate occassions. I am attempting to file this instant petition which is being tendered to you for review and to investigate my allegations.

For more than three years since filing civil actions and petitions to the District Court for the D.C. Circuit, I have recived insurmountable prejudice from the court and the clerks offices. I have attempted to have the Chief Judges' of the District Court intervene, which has been stonewalled for three years. My attempts have been fruitless. I respectfully request that you and your office follow-up and review the allegations that are being lodged against officials of the District Court.

My inability to perfect my claims are rights are do to the fact that I have several pending suits against Judges Hogan, Oberdorfer, and Richey in 91-2705, that Judge Oberdorfer continues to preside over after being named as the chief defendant in this case. It has been dormant for more than fifteent to eighteen months. There is criminal misconduct being inculcated against me and other pro se prisoners who have valid claims against their attorneys, such as myself, but unable to perfect those claims do to the refusal of the District Court to entertain and address Constitutional rights violations. Such has been the case with me, because of the political overtones behind those lawsuits against several judges of this forum.

I respectfully ask that you maintain your adamant stance on affording prisoners who have been misrepresented by attorneys and who had not received fair trials, as you have fervently stated during your confirmation hearings. Please investigate my claims and allegations, because there is a serious injustice being conducted against me because of my pursuit of my freedom and the nature of individuals I have been raising allegations against and my pending civil action against my trial attorneys in 90-2090 (LFO). Thank you for your time and cooperations in this matter. I look to see the results of any investigations you and your contingents may pursue in relationship with these assertions.

Respectfully Submitted

Grant Anderson

GRANT ANDERSON 166-978
P.O. Box 85
Lorton, Va. 22199

cc: Attorney General United States
Solicitor General Days
Grant Anderson Files

APPENDIX (App. 20a)

AO 243
REV 6/82

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

93 1057

United States District Court	District OF COLUMBIA	
Name of Movant GRANT ANDERSON	Prisoner No. 166-978	Docket No.
Place of Confinement OCCOQUAN FACILITY P.O. BOX 85 LORTON, VA. 22199 (include name upon which convicted)		
UNITED STATES OF AMERICA V. GRANT ANDERSON (full name of movant)		

FILED
MAY 28 1993
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

MOTION

1. Name and location of court which entered the judgment of conviction under attack SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA D.C. CIRCUIT

2. Date of judgment of conviction 10-27-88

3. Length of sentence 18 1/3 years to Life

4. Nature of offense involved (all counts) TWO COUNTS BURGLARY 1 WHILE ARMED; ASSAULTING AN OFFICER WHILE ARMED: ASSAULT WITH INTENT TO RAPE WHILE ARMED

5. What was your plea? (Check one)
   (a) Not guilty ☒
   (b) Guilty ☐
   (c) Nolo contendere ☐

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check one)
   (a) Jury ☒
   (b) Judge only ☐

7. Did you testify at the trial?
   Yes ☒ No ☐

8. Did you appeal from the judgment of conviction?
   Yes ☒ No ☐

9. If you did appeal, answer the following:

(a) Name of court D.C. COURT OF APPEALS

(b) Result Affirmed in part, reversed in part, Double Jeopardy

(c) Date of result February 28, 1990

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications or motions with respect to this judgment in any federal court?
Yes ☒ No ☐

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court United States District Court, D.C. Circuit

(2) Nature of proceeding Habeas Corpus Proceedings

(3) Grounds raised Ineefective Assistance of Counsel; Sufficiency of Evidence; Prosecutorial Misconduct

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☒ No ☐

(5) Result

(6) Date of result

(b) As to any second petition, application or motion give the same information:

(1) Name of court United States District Court, D.C. Circuit

(2) Nature of proceeding Habeas Corpus Proceedings

(3) Grounds raised Denial of Due Process On Appeal For More than 39 months where issues from direct appeal have never been resolved nor entertained.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result Petition was never filed when submitted in July of 1992.

(6) Date of result

(c) As to any third petition, application or motion, give the same information:

(1) Name of court United States District Court, D.C. Circuit

(2) Nature of proceeding Habeas Corpus Proceedings

(3) Grounds raised Denial of Due Process in appellate division for more than 41 months.

(4) Did you receive an evidentiary hearing on your petition, application or motion?
Yes ☐ No ☒

(5) Result Petition was never filed when submitted once again.

(6) Date of Result

(d) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐
(2) Second petition, etc. Yes ☐ No ☒
(3) Third petition, etc. Yes ☐ No ☒

(e) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

The second and third petitions were never filed after being submitted to the Court in July of 1992 and again in September of 1992.

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
X(e)X Conviction obtained by a violation of the privilege against self-incrimination.
X(f)X Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
X(g)X Conviction obtained by a violation of the protection against double jeopardy.
(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.
X(i)X Denial of effective assistance of counsel.
X(j)X Denial of right of appeal.

A. Ground one: Conviction obtained by violation of the privilege against self-incrimination.

Supporting FACTS (tell your story *briefly* without citing cases or law: during the course of my criminal trial in Superior Court, trial counsel allowed the prosecuting attorney to use conviction beyond the ten year limitation period to impeach my testimony and credibility in violation of the Fed. R. of Evid; and counsel stipulated to its use against me for impeachment purpose when I chose to testify in my own behalf.

B. Ground two: Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to defendant.

Supporting FACTS (tell your story *briefly* without citing cases or law): The prosecuting attorney suppressed statements by the complainant that her assailant was light-skinned with blonde or light brown hair; and the statements that were made during the Internal Affairs investigation by complainant to several detective on the scene that were mitigating to the petitioner which negated his guilt.

C. Ground three: Conviction obtained by a violation of the Double Jeopardy statute or clause.

Supporting FACTS (tell your story *briefly* without citing cases or law): I was originally charged with two counts of Burglary I while armed and convicted on both counts when there was only one entry on a multiplicitious indictment.

D. Ground four: Denial of effective assistance of counsel

Supporting FACTS (tell your story *briefly* without citing cases or law): Trial counsel refused to present to the jury information after receiving the Radio Run that her client was depicted as a light-skinned man with blonde or light brown hair which was material to guilt; counsel stipulated the use of impeaching convictions beyond the ten year limitation period in violation of F.R. of Evid.; counsel failed to move for a new trial during the critical seven day

(See attached pages hereto)

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

Denial of Appeal. This issue was presented in a subsequent petition for a writ of habeas corpus which the District Court has been refusing to file; at the time the first petition was filed, I was still trying to perfect my claims in the D.C. Court of appeals to no avail.

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?
Yes ☒ No ☐

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Mark Rochon D.C. PUBLIC DEFENDER SERVICE, 451 Indiana Avenue N.W., Wash., D.C. 20001

(b) At arraignment and plea Avis E. Buchanan , D.C. PUBLCI DEFENDER SERVICE, 451 Indiana Ave., N.W. Wash., D.C. 20001

(c) At trial Avis E. Buchanan, see above

(d) At sentencing Avis E. Buchanan, se above

Denial of Effecti Assistance Of Counsel C nued From Page Six (6):
(COUNT D)

period for failure of the prosecution to prove all essential elements of the chargeable indictment which displayed variance; counsel failed to arrest judgment after allowing petitioner to be convicted on a multiplicitious indictment twice for the same crime and sentenced to two concurrent terms for one entry; failure to pursue my lawful objective when petitioner requested that Dr. Morant be subpoened as his crucial witness to aver that the petitioner was drunk the night of the alleged incident, and that the requisite intent for Assault with Intent to Rape while armed was not there and counsel refused to do so; failure to properly investigate the case, when other persons where arrested the same night, June 22, 1988, within the Second District Police Department and counsel failed to secure the arrest records to see if others matched that description; counsel failed to file a notice of appeal when the trial Court denied a pro se motion for a new trial filed by me. . . subjected me to the lost of appellate review on all issues from direct appeal.

QUESTION # 13 CONTINUED FROM PAGE (6) SIX:

There is an inordinate delay of more than 42 forty-two months by the D.C. Court of Appeals to allow me the right to address issues from my direct appeal that were never resolved. Appellate counsel was appointed to investigate claims of ineffectiveness of trial counsel and refused to do so. . . subjecting me to procedural default for not raising all issues while my direct appeal was pending. After my affirmance, counsel abandoned me in the appellate process and I had to file my own motions to the trial court to raise these issues. I also attempted to perfect my claims against appellate counsel for his inexcusable neglect to stay my appeal and file the necessary motions in the trial court to raise those issues that trial counsel was indeed ineffective, inter alia, and failed to file a notice of appeal from the denial of my pro se motion for a new trial on October 27, 1988, which was denied, and this issues was never raised; also, the fact that appellate counsel never raised the Double Jeopardy issue on direct appeal, inter alia, in 88-1522 before the D.C. Court Of Appeals. I recently filed to have my appeals reheard in 1990, and since then, the appellate court has been sitting on my claims since then.

AO 243
REV 6/82

(e) On appeal J. HERBIE DI FONZO, 110 North Royal Street, Alexandria, Va. 22314, Suite 200.

(f) In any post-conviction proceeding Pro Se

(g) On appeal from any adverse ruling in a post-conviction proceeding Robert Dowlut, Esq., 6206 Adelaide Rd., Bethesda, Md. 20817; Elaine Mittleman, Esq., 2040 Arch Drive, Falls Church, Va. 22043.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?
Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?
Yes ☒ No ☐

(a) If so, give name and location of court which imposed sentence to be served in the future: SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA, 500 Indiana Ave. N.W., Washington, D.C. 20001

(b) Give date and length of the above sentence: FORTY MONTHS TO TEN (10) YEARS

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?
Yes ☐ No ☒

Wherefore, movant prays that the Court grant him all relief to which he may be entitled in this proceeding.

Grant Anderson
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

April 5th, 1993
(date)

Grant Anderson
Signature of Movant

APPENDIX (App. 21a)

District of Columbia
Court of Appeals

No. 88-1522

GRANT ANDERSON,

Appellant,

v.

F7226-88

UNITED STATES,

Appellee.

BEFORE: Newman, Ferren, and Steadman, Associate Judges.

O R D E R

On consideration of the *pro se* request of appellant to recall the mandate on the account of ineffectiveness of appellate counsel, it is

ORDERED that the motion is denied without prejudice to appellant filing a motion with the trial court indicating his accuracy of transcript and ineffective assistance of trial counsel allegations.

PER CURIAM

P-2

Copies to:

Honorable Fred B. Ugast

Clerk, Superior Court

J. Herbie DiFonzo, Esquire
110 N. Royal Street
Suite 200
Alexandria, VA 22314

Mr. Grant Anderson
2611 N. Guadalupe Street
Seguin, TX 78155

John R. Fisher, Esquire
Assistant United States Attorney

das

ROBERT DOWLUT
ATTORNEY AT LAW
9200 BULLS RUN PARKWAY
BETHESDA, MARYLAND 208.

Bar Membership:
District of Columbia
U.S. Supreme Court
U.S. Court of Appeals
District of Columbia,
3rd, 4th & 5th Circuits
U.S. District Court Md.

July 14, 1993

Grant Anderson
Prisoner No. 166 978
P. O. Box 85
Lorton, Virginia 22199

Re: Anderson v. U.S., D.C. Court of Appeals
No. 91-CO-1254 & No. 92-CO-302

Dear Mr. Anderson:

I regret to inform you that on July 9, 1993, the court affirmed your conviction. The opinion of the court is enclosed. In view of the court's decision, it is my opinion that a request for a rehearing, a rehearing en banc, or petition for a writ of certiorari would be fruitless. This development ends my appointment in your case.

Good luck.

Cordially,

Robert Dowlut

Robert Dowlut

Enclosure

RD:bhs